120-1

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1886.**

No. 1288.

CHARLES MALI, CONSUL OF HIS MAJESTY THE KING OF THE BELGIANS, AND JOSEPH WILDENHUS, APPELLANTS,

*vs.*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY.

PHILADELPHIA BAR ASSOCIATION

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

**FILED NOVEMBER 15, 1886.**

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1886.

No. 1288.

CHARLES MALI, CONSUL OF HIS MAJESTY THE KING OF THE BELGIANS, AND JOSEPH WILDENHUS, APPELLANTS,

*vs.*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

INDEX.


| | Original. | Print. |
|---|---|---|
| Demand for prisoners by Belgian consul | 1 | 1 |
| Proof of service of demand | 2 | 1 |
| Petition for writ of *habeas corpus* | 4 | 2 |
| Order allowing writ of *habeas corpus* | 7 | 3 |
| Writ of *habeas corpus* | 8 | 3 |
| Notice to prosecutor of Hudson Co. | 9 | 4 |
| Proof of service of notice | 10 | 4 |
| Jailor's return to writ of *habeas corpus* | 11 | 4 |
| Exhibit B—Commitment of Joseph Wildenhus by coroner | 11 | 5 |
| E— " Giovanni Gobibooich by coroner | 12 | 5 |
| F— " Joseph Ostermeyer by coroner | 13 | 6 |
| A— " Joseph Wildenhus by police justice | 14 | 6 |
| C— " Giovanni Gobubosich by police justice | 15 | 7 |
| D— " John J. Ostermeyer by police justic | 16 | 8 |
| Extracts from "Reglements Consulaires" (French) | 19 | 9 |
| (Translation) | 21 | 10 |
| Opinion of the court | 23 | 11 |
| Order dismissing writ | 30 | 14 |
| Petition for appeal | 31 | 14 |
| Order allowing appeal | 31 | 14 |
| Clerk's certificate | 32 | 15 |
| Citation | 33 | 15 |
| Proof of service of citation | 34 | 15 |


JUDD & DETWEILER, PRINTERS, WASHINGTON.

law of nations, and by virtue of treaties existing between the United States and the Kingdom of Belgium, the said offence is solely cognizable by the authority of the laws of the said Kingdom of Belgium; and your petitioner thereupon alleges that the said Joseph Wildenhus is in custody in violation of the Constitution, laws, and treaties of the United States, and should be released and delivered up to your petitioner, to be dealt with according to the law of Belgium, which release and delivery your petitioner has demanded, but the same is refused.

Wherefore your petitioner prays that this honorable court will award unto each of the persons detained and confined as aforesaid the writ of *habeas corpus* in order that the said matters may be duly inquired into and such proceedings had thereafter as may be conformable to law.

Dated New York, October eleventh, 1886.

[L. S.] CHARLES MALI,
*Consul for Belgium.*

Sworn to and subscribed before me this 11th day of October, 1886.

[L. S.] HARTLEY G. PELLETIER,
*Notary Public, Kings County and New York County, State of New York.*

The foregoing petition is made at my request and with my consent, and I pray for the writ of *habeas corpus* as asked for by the consul.

JOSEPH WILDENHUS.

7 [Endorsed:] U. S. circuit court, district of New Jersey. His majesty the King of the Belgians, by Charles Mali, Belgium consul for New York and New Jersey, for and in behalf of Joseph Wildenhus and others, Belgian subjects, against The Keeper of the Common Jail of Hudson County, New Jersey. Original petition.

*Allowance of Writ.*

Writ allowed as prayed for & returnable at the court-rooms in the U. S. building at Trenton, N. J., on Friday, October 15, 1886, at 11 a. m., notice of hearing to be given to prosecuting attorney of Hudson Co., N. J.

October 12, 1886.

W. McKENNAN, *Cir. J.*

8 The President of the United States of America to the Keeper of the Common Jail of the County of Hudson, in the State of New Jersey:

We command you that you have the bodies of Joseph Wildenhus, Gionviennie Gobnbosich, and John J. Ostenmeyer, by you imprisoned or detained, as it is said, by whatsoever name or names the said persons, or either of them, may be called, before the judges of the circuit court of the United States, at a stated term thereof, to

be held at the United States court-rooms in Trenton, New Jersey, on the 15th day of October, 1886, at 11 a. m., and do and receive what shall then and there be considered concerning the said persons. And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Trenton, this 12th day of October, 1886.

[L. S.] S. D. OLIPHANT, *Clerk.*

9 Hon. C. H. Winfield, prosecutor of the pleas, Hudson county, New Jersey:

SIR: Take notice that the circuit court of the United States for the district of New Jersey has this day granted a writ of *habeas corpus* requiring the keeper of the common jail of Hudson county, New Jersey, to produce the bodies of Joseph Wildenhus, Gionviennie Gobnbosich, and John J. Ostenmeyer, now confined in said jail, before said court, at the United States court-rooms in Trenton, N. J., on the 15th day of October, 1886, at 11 a. m., for the purpose of inquiring into the causes of imprisonment of said persons.

Dated New York, October 13, 1886.

COUDERT BROTHERS,
*Attorneys for Belgian Government, Acting in Behalf of its Subjects, the said Persons Imprisoned.*

United States Circuit Court, District of New Jersey.

HIS MAJESTY THE KING OF THE BELGIANS, by Charles Mali, Belgian Consul, for and in Behalf of Joseph Wildenhus and Others, Belgian Subjects,

10 *against*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY.

CITY AND COUNTY OF NEW YORK, *ss:*

R. Ogle Mullikin, being duly sworn, deposes and says that he is of the age of eighteen years and upwards, and is a clerk in the office of Coudert Brothers, attorneys for the petitioner above named; that on the 14th day of October, 1886, at the court-house in Jersey City, Hudson county, New Jersey, in the district of New Jersey, between the hours of 10 a. m. and 11 a. m., he duly personally served on C. H. Winfield, prosecuting attorney, a notice of which the annexed is a copy, by delivering the same to and leaving with the said C. H. Winfield.

R. OGLE MULLIKIN.

Sworn to before me this 14th day of October, 1886.

[L. S.] HARTLEY G. PELLETIER,
*Notary Public, Kings County and New York County, State of New York.*

11 By virtue of the annexed writ to me directed, I, David C. Joyce, keeper of the common jail of the county of Hudson,

in the State of New Jersey, have the bodies of the said Joseph Wildenhus, Gionviennie Gobnbosich, and John J. Ostenmeyer, as I am therein commanded; and I do further certify that the said Joseph Wildenhus is detained in my custody by virtue of a commitment made by Samuel W. Stilsing, police magistrate of Jersey City (a copy of which is hereto annexed and marked "A"), and also by virtue of a commitment made by Terrence S. Haughey, coroner of the county of Hudson (a copy of which is hereto annexed and marked "B"), which is the cause of his detention. I further certify that the said Gionviennie and John J. Ostenmeyer are detained in my custody by virtue of commitments made by Samuel W. Stilsing, magistrate of Jersey City (a copy of which is hereto annexed and marked "C" & "D"), and also by virtue of a commitment made by Terrence S. Haughey, coroner of the county of Hudson (a copy of which is hereto annexed and marked "E" & "F").

"B."

*Commitment.*

STATE OF NEW JERSEY, } ss:
*Hudson County,* }

To the constables, sheriff, and keeper of said county:

Whereas Joseph Wildenhus stands charged on oath before me, one of the coroners in and for said county, that he has inflicted wounds which caused the death of Henry Feytons on board of the steamship Noordland on the sixth day of October, A. D. 1886, which said steamship at the time laid in her slips fastened to the wharf in Jersey City:

12 These are, therefore, in the name of the State of New Jersey, to require you, the said constables, or one of you, to take the said Joseph Wildenhus and deliver him to the sheriff of said county, or the keeper of the county jail thereof, at the said jail, who is required to receive the body of the said Joseph Wildenhus into his jail and custody, and him safely keep until thence delivered by due course of law, and for so doing this shall be your warrant.

Given under my hand and seal this eighth day of October, 1886.

T. S. HAUGHEY, *Coroner.*

"E."

*Commitment.*

STATE OF NEW JERSEY, } ss:
*Hudson County,* }

To the constables, sheriff, and keeper of the jail of said county:

Whereas Giovanni Gobibooich is detained by me, Terrence S. Haughey, one of the coroners in and for said county of Hudson, as a witness in behalf of the State of New Jersey against Joseph Wildenheis, who stands suspected of having caused the death of Henri Feytons on October 6th, 1886, on board of the steamship Nordland:

These are, therefore, in the name of the State of New Jersey, to

require you, the said constables, or one of you, to take the said Givanni Gobubooich and deliver him to the sheriff of said county, or the keeper of the common jail thereof, at the said jail, who is required to receive the body of the said Givanni Gobibooich into his jail and custody, and him safely to keep until thence deliv-
13 ered by due course of law, and for so doing this shall be your warrant.

Given under my hand and seal this eighth day of October, 1886.

T. S. HAUGHEY, *Coroner.*

"F."

*Commitment.*

STATE OF NEW JERSEY, } ss:
*Hudson County,* }

To the constables, sheriff, and keeper of the jail of said county:

Whereas Joseph Ostermeyer is detained by me, Terrence S. Haughey, one of the coroners in and for said county of Hudson, as a witness in behalf of the State of New Jersey against Joseph Wildenheis, who stands suspected of having caused the death of Henri Feytens on October 6th, 1886, on board of the steamship Noordland:

These are, therefore, in the name of the State of New Jersey, to require you, the said constables, or one of you, to take the said Joseph Ostermeyer and deliver him to the sheriff of said county, or the keeper of the common jail thereof, at the said jail, who is required to receive the body of the said Joseph Ostermeyer into his jail and custody, and him safely keep until thence delivered by due course of law, and for so doing this shall be your warrant.

Given under my hand and seal this eighth day of October, 1886.

[L. S.] T. S. HAUGHEY, *Coroner.*

14 "A."

*Commitment on Charge of an Indictable Offense.*

The First District Police Court of Jersey City.

THE STATE *vs.* JOSEPH WILTENHAUS.

CITY OF JERSEY CITY, } ss:
*County of Hudson, State of New Jersey,* }

To the policemen of said city, the sheriff, the constables, and keeper of the common jail of said county:

Whereas Joseph Wiltenhaus stands charged on oath before me, a police justice of Jersey City, by Capt. Frederick T. Farrier, of Jersey City police, that on the 6th day of October, 1886, in Jersey City aforesaid, the said accused person, Joseph Wiltenhaus, did, wilfully and of his malice aforethought, *did* murder one Fegtens by feloniously assaulting the said Fegens and giving him a mortal wound, of which said mortal wound he languished a short time and then died:

These are, therefore, in the name of the State of New Jersey, to

require you, the said policemen, sheriff, and constables, or one of you, to take the accused person and deliver him to the keeper of the jail aforesaid, who is required to receive the body of the said accused person into his jail and custody, and him safely keep until thence delivered by due course of law, and for so doing this shall be your warrant.

Given under my hand and seal this seventh day of October,
15 A. D. one thousand eight hundred and eighty-six.

[L. S.] SAMUEL W. STILSING,
*Police Justice of Jersey City.*

"C."

*Commitment as a Witness.*

The First District Police Court of Jersey City.

THE STATE *vs.* GIOVANNI GOBUBOSICH.

CITY OF JERSEY CITY,
*County of Hudson, State of New Jersey,* } *ss:*

To the policemen of said city, the sheriff, the constables, and keeper of the common jail of said county:

Receive into your custody the body of Giovanni Golubosich herewith sent you by me, Samuel W. Stilsing, one of the police justices of Jersey City, in the county of Hudson, it appearing to me that said Giovianni Golubosich is a material witness against Joseph Wiltenhaus now committed to the jail aforesaid on a charge on oath against him by Frederick T. Farrier that he, the said Joseph Wiltenhaus, did feloniously murder one Fetgens, and it appearing to my satisfaction that the said Giovianni Golubosich has no settled place of residence, and that he is not possessed of goods or chattels, lands or tenements, wherever to levy the penalty of a recognizance, and being required by me to find sureties for his personal appearance at the next court of oyer and terminer and general jail delivery to be holden at Jersey City, Hudson county, to give evidence
16 on the part of the State relative to the complaint and charge aforesaid, and the said Giovianni Golubosich, now neglecting and refusing to find such sureties as aforesaid, for want of such sureties you are commanded him safely to keep until the said sessions of the said court, there to give evidence unless he shall be sooner discharged by due course of law, for which this shall be your sufficient warrant.

These are, therefore, in the name of the State of New Jersey, to require you, the said policemen, sheriff, and constables, or one of you, to take the said accused person and deliver him to the keeeper of the jail aforesaid, who is required to receive the body of the said accused person into his jail and custody, and him safely keep until thence delivered by due course of law, and for so doing this shall be your warrant.

Given under my hand and seal this seventh day of October, A. D one thousand eight hundred and eighty-six.

SAMUEL W. STILSING, [L. S.]
*Police Justice of Jersey City.*

"D."

*Commitment as a Witness.*

The First District Police Court of Jersey City.

THE STATE *vs.* JOHN J. OSTERMEYER.

CITY OF JERSEY CITY, }
*County of Hudson, State of New Jersey,* } *ss:*

17 To the policemen of said city, the sheriff, the constable, and keeper of the common jail of said county:

Receive into your custody the body of John J. Ostermeyer, herewith sent you by me, Samuel W. Stilsing, one of the police justices of Jersey City, in the county of Hudson, it appearing to me that said John J. Ostermeyer is a material witness against Joseph Wiltenhaus now committed to the jail aforesaid on a charge on oath against him by Capt. Frederick T. Farrier that Joseph Wiltenhaus did, wilfully and of his malice aforethought, *did* murder one —— Fetgens by feloniously assaulting the said —— Fegtent and giving him a mortal wound, of which said mortal wound he languished and died, and it appearing to my satisfaction that the said John J. Ostermeyer has no settled place of residence, and that he is not possessed of goods or chattels, lands or tenements, wherever to levy the penalty of a recognizance, and being required to find sureties for his personal appearance at the next court of oyer and terminer and general jail delivery to be holden at Jersey City, Hudson county, to give evidence on the part of the State relative to the complaint and charge aforesaid, and the said John J. Ostermeyer, now neglecting and refusing to find such sureties, for want of such sureties you are commanded him safely to keep until the said sessions of the said court, there to give evidence, unless he shall be sooner discharged by due course of law; for which this shall be your sufficient warrant.

These are, therefore, in the name of the State of New Jer-
18 sey, to require you, the said policemen, sheriff, and constables, or one of you, to take the said accused person and deliver him to the keeper of the jail aforesaid, who is required to receive the body of the said accused person into his jail and custody, and him safely keep until thence delivered by due course of law, and for so doing this shall be your warrant.

Given under my hand and seal this 7th day of October, A. D. one thousand eight hundred and eighty-six.

SAMUEL W. STILSING, [L. S.]
*Police Justice of Jersey City.*

19 United States Circuit Court, District of New Jersey.

KING OF THE BELGIANS, by Charles Mali, Belgian Consul for the States of New York and New Jersey, for and in Behalf of Joseph Wildenhus and Others, Belgian Subjects,

*Against*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY.

Extract from a work entitled "Reglements consulaires," issued by the Kingdom of Belgium to its consuls abroad, and read in evidence before the court at the hearing of this proceeding.

[illegible] 11 Mars 1837. Léopold, Roi des Belges

MIDDLE SECTION OF PAGE - MISSING

Il fera les démarches convenables pour obtenir que la connaissance de l'affaire lui soit remise afin qu'elle soit ultérieurement jugée d'après les lois belges.

Art. 10. Lorsque les hommes appartenant à l'équippage d'un navire belge se rendent coupables de délits ou de crimes hors du navire, ou même à bord du navire, mais envers des personnes étrangères à l'équipage, le consul, si l'authorité locale les arrête ou procède contre eux, fera les démarches nécessaires pour que les Belges ainsi arrêtés soient traités avec humanité, défendus et jugés impartialement.

(Ministère des Affaires Etrangères, "Reglements Consulaires.")

21 (*Translation of the Foregoing Extract from "Reglements Consulaires" of Belgium.*)

Royal decree of 11th March, 1857. Leopold, King of the Belgians.

To all, now and in the future, Greeting:

Considering the law of the 31st December, 1851, on consuls and consular jurisdiction:

Upon the suggestion of our minister of foreign affairs, we have decreed and hereby decree—

Title 1st. Of the arrival of vessels.

Title 2nd. Of the stay of vessels.

MIDDLE SECTION OF PAGE - MISSING

(Ministry of Foreign Affairs—Consular Rules.)

(Endorsed:) United States circuit court, district of New Jersey. King of the Belgians, by Charles Mali, Belgian consul, in behalf of Joseph Wildenhus and others, *vs.* The Keeper of the Common Jail of Hudson County, N. J. Extract from a work entitled "Reglements Consulaires," issued by the Kingdom of Belgium to its consuls abroad and read in evidence before the court at the hearing of this proceeding. Coudert Brothers, attorneys for petitioner.

23 In U. S. Circuit Court for District of New Jersey.

*In re* JOSEPH WILDENHUS *et al.* *Habeas Corpus.*

Coudert Brothers, for petitioner; Charles H. Winfield and William Y. Johnson, assistant atty. gen., for the State.

WALES, *J.*:

This writ was directed to the keeper of the jail of Hudson county, New Jersey, on the petition of Charles Mali, Belgian counsul for the States of New York and New Jersey, in order to obtain the discharge and surrender of Joseph Wildenhus, who is charged with the crime of murder, and of two other persons who are detained, in default of bail, as witnesses for the State. Copies of the warrants of commitment, which are in regular form, are annexed to the return to the writ, and from these and the statements in the petition it appears that on the sixth of October of the present year, whilst the Belgian steamship "Noordland" lay moored to her wharf in Jersey City, New Jersey, an altercation took place between two of the crew, to wit, the above-named Joseph Wildenhus and one Figens, in which Wildenhus stabbed Figens with a knife, from the effects of which the latter soon after died. Both parties were Belgian subjects and domiciled in that kingdom. The affair occurred below the deck of the vessel, and no one but members of the crew were present. Wildenhus was
24 arrested and committed to jail by the public authorities of Jersey City, as if the offence had been committed in the body of Hudson county, and it is proposed that the offender shall be tried and otherwise dealt with by the State of New Jersey.

It is claimed that under the rule of international law, and also by virtue of treaties now in force between the United States and Belgium, the offence in question is cognizable solely under the laws of Belgium, and that therefore the imprisonment is unlawful.

The question, it is contended, is not whether a vessel of a nation by going into the port of a foreign state becomes subject to the municipal laws of that state, nor whether the State of New Jersey could take cognizance of the crime in the absence of the exercise of authority by the foreign state, but whether the foreign state, when it may choose to assert the privilege, has the exclusive right to control the internal affairs of its own ships, both civil and criminal, even when in the ports of another state, provided the tranquility of such other state is not involved or persons entitled to its protection concerned. It is further claimed that under these circumstances the jurisdiction of the foreign state is exclusive. These are general propositions. The discharge and surrender of the prisoners are demanded on two distinct and independent grounds:

First. Because they are confined in prison by the State of
25 New Jersey, in violation of a treaty of the United States; and,

Second. Because, being subjects of a foreign state and domiciled therein, they are in custody for an act done under a privilege, protection, or exemption claimed under the sanction of such foreign state, the validity and effect whereof depend upon the law of na-

tions, namely, the privilege of a trial of the offence before a tribunal existing under the laws of Belgium and of exemption from the jurisdiction of the local tribunals of this country.

And it is contended that under the express words of the statute (section 753, R. S., U. S.) defining the jurisdiction of this court in cases of *habeas corpus* either of these grounds is sufficient, and that both must fail before the writ can be dismissed. The statute referred to reads as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or committed under any alleged right, title, authority, privilege, protection, or exemption claimed under
26 the commission or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The plain construction of this section restricts the jurisdiction of the court to such cases as come within some one of the causes of detention or imprisonment therein specifically mentioned, and we are not at liberty to go beyond them, although, under special circumstances and for reasons of public policy, we might entertain the opinion that a prisoner ought to be discharged. In regulating the power to issue the writ one purpose, if not the chief one, of the statute is to avoid and prevent any interference or clashing of authority between the courts of the United States and those of the several States, and the law should be carefully administered with that intent in view. The interpretation and application of the law of nations which could be considered in this form of proceeding can only arrive under the conditions referred to in the statute, and as these conditions in no way relate to or concern the cause of Wildenhus' imprisonment they are not open for discussion here; for it cannot be pretended that he committed the act for which he is in custody "under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of 'Belgium,' or under color thereof;" and it is only the validity and effect of such commis-
27 sion, order or sanction, so far as they depend on the law of nations, which, under the provisions of the statute, can now be inquired into by this court. Admitting, however, that by the law of nations and by "common usage" the accused is entitled to be tried by a tribunal of his own country, that fact can be brought to the notice of the court of New Jersey in which he may be arraigned, and he will receive the full benefit of it; or, relying on his right and privilege under that law to be tried in Belgium, he may apply for a discharge from his present imprisonment on a writ of

*habeas corpus* issued by the State court. On the construction we have given to the statute, we have not the power to order Wildenhus' discharge on this ground, and it is unnecessary, therefore, to review the very able and instructive argument contained in the brief of his counsel on this branch of the case. It is enough to say that we can find no authority in the statute of this court to administer the law of nations in [the] present proceeding.

If, as contended, the accused is in custody in violation of a treaty of the United States, then it would be the duty of this court to order his surrender.

But is this contention sustained by the language or spirit of article XI of the treaty of 1868 between the United States and Belgium, which is in these words:

"Consuls general, consuls, vice-consuls, and consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences
28 which may arise either at sea or in port between the captains, officers, and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. Neither the Federal, State, or municipal authorities or courts in the United States, nor any court or authority in Belgium, shall on any pretext interfere in these differences."

The entire purport of this article is too clear to admit of any doubt. The negotiators of the treaty never intended to confer, nor have they by the most liberal and reasonable interpretation which can be given to it conferred, authority on their consuls to take cognizance of crimes and offences committed against the local laws of either country. The article contains the usual provision for the settlement of such "differances" as ordinarily arise between officers and crews in relation to work and wages and discipline, which is inserted in nearly the same words in many of the treaties between the United States and other commercial nations. The supposition that the phrase, "exclusive charge of the internal order of the merchant vessels," and the word "differences," were designated to embrace crimes, is excluded by what follows them, since, if such a meaning could be applied, then the courts of neither country can "on any pretext interfere," and the consuls "shall alone take cognizance" of crimes committed either at sea or in port by and among the officers and crews of vessels belonging to their respective countries, provided always that "the peace and tranquillity of the
29 port" are not disturbed, and no wrong or injury is inflicted upon any person not belonging to the ship. It is conceded that Wildenhus' offense was committed within the territorial jurisdiction of New Jersey, but it is insisted that, under the circumstances mentioned and by force of the existing treaty, it becomes exclusively cognizable under the laws of Belgium. The consul does not claim the power to try him, but to sit merely as a committing magistrate. In reply to this it can be said that the treaty article makes no provision for the creation and organization of a consular court, nor does it even authorize the consul to act as a committing magistrate.

For these reasons the writ must be dismissed for want of jurisdiction in this court and the premises remanded.

Nov. 9, 1886.

L. E. WALES, *J.*

(Indorsed): United States circuit court, district of New Jersey. *In re* Joseph Wildenhus on *habeas corpus.* Opinion filed November 9, 1886. S. D. Oliphant, Clerk.

30 *Order Dismissing Writ.*

United States Circuit Court, District of New Jersey.

THE KING OF THE BELGIANS, by Charles Mali, Consul, etc., Acting in Behalf of Joseph Wildenhus and Others,

*against*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY.

And now, to wit, this ninth day of November, A. D. 1886, this cause having been heard on the petition and the return to the within writ, and on the facts stated therein and admitted, and the same having been held under advisement, it is considered by the court that this court has not jurisdiction of the causes of imprisonment and detention set forth in the said petition and return, and it is therefore ordered, adjudged, and decreed by the court that the prisoners within named be remanded to the custody of the keeper of the jail of Hudson county, in the State of New Jersey, and that the said writ be dismissed.

L. E. WALES, *J.*

31 *Habeas Corpus.*

Circuit Court of the United States, District of New Jersey.

KING OF THE BELGIANS, by Charles Mali, Consul, etc., Acting in Behalf of Joseph Wildenhus and Others,

*against*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY.

The petitioners in the above-entitled matter hereby appeal to the Supreme Court of the United States from the judgment and order of this court this day entered dismissing the writ of *habeas corpus* heretofore granted and remanding the prisoners to the keeper of the Hudson county jail, and pray the allowance hereof by the court.

COUDERT BROTHERS,
*Attorneys for Petitioners.*

The foregoing appeal having been taken in open court in the presence of the prosecutor of the pleas of Hudson county, New Jer-

sey, and the assistant attorney general of the said State, is hereby allowed.

Dated at Trenton, N. J., Nov. 9, 1886.

L. E. WALES, *J.*

(Endorsed:) U. S. circuit court, district of New Jersey. King of the Belgians, by Charles Mali, consul, etc., in behalf of Joseph Wildenhus & o'rs, *vs.* The Keeper of the Common Jail of Hudson County, N. J. Appeal from judgment dismissing writ. Coudert Brothers, atty's for petitioners. Filed November 9, 1886. S. D. Oliphant, clerk.

32 UNITED STATES OF AMERICA, } *ss:*
*District of New Jersey,* }

I, S. D. Oliphant, clerk of the circuit court of the United States for the district of New Jersey, do hereby certify the foregoing to be a true transcript of the proceedings in the said entitled cause as the same remains on file and of record in my office at Trenton, in said district.

In testimony whereof I hereto set my hand and affix the seal of said court at Trenton, in said district, this eleventh day of November, A. D. 1886.

[The Seal of the U. S. Circuit Court, Dist. of New Jersey.]

S. D. OLIPHANT, *Clerk.*

33 The United States of America to The Keeper of the Common Jail of Hudson County, State of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to an order allowing an appeal filed in the clerk's office of the circuit court of the United States for the district of New Jersey, wherein Charles Mali, consul of his majesty the King of the Belgians, and Joseph Wildenhus are appellants and you are appellee, to show cause, if any there be, why the decision rendered against the said petitioners should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-six.

M. R. WAITE.

34 On this sixteenth day of November, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared R. Ogle Mullikin before me, the subscriber, Hartly G. Pelletier, a notary public for the State of New York, and makes oath that he delivered a true copy of the within citation to —— Joyce, keeper of the common jail of Hudson county, State of New Jersey.

R. OGLE MULLIKIN.

Sworn to and subscribed the 16th November, A. D. 1886.

[Seal of Hartley G. Pelletier, Notary Public, Kings County, N. Y.]

HARTLEY G. PELLETIER,
*Notary Public, Kings County and New York County,*
*State of New York.*

[Endorsed:] No. 1288. Supreme Court U. S. Oct'r term, 1886. Charles Mali, consul of the King of the Belgians, &c., *et al.*, app'ts, *vs.* The Keeper of the Common Jail of Hudson Co., N. J. Citation & proof of service.

[Stamped:] Office Supreme Court U. S. Filed Nov. 17, 1886. James H. McKenney, clerk.

Endorsed on cover: New Jersey C. C. U. S. No. 1288. Charles Mali, consul of his majesty the King of the Belgians, and Joseph Wildenhus, appellants, *vs.* The Keeper of the Common Jail of Hudson County, New Jersey. Filed November 15, 1886.

120

Office Supreme Court U. S.
FILED
NOV. 15, 1886

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

THE KING OF THE BELGIANS, BY CHARLES MALI, BELGIAN CONSUL, ETC., IN BEHALF OF JOSEPH WILDENHUS AND OTHERS,

*Appellant,*

*vs.*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

*Appellee.*

**MEMORANDUM ON MOTION TO ISSUE SPECIAL CITATION, AND FOR LEAVE TO FILE RECORD ON APPEAL, DOCKET THE CAUSE, AND ADVANCE THE SAME FOR HEARING.**

F. R. COUDERT,
EDWARD K. JONES,
*Counsel for Appellant.*

COUDERT BROTHERS,
*Attorneys for Appellant.*

MIDDLEDITCH, Law Case Printer, (Law Telephone 505), 26 Cortlandt Street, N. Y.

# In the Supreme Court of the United States,

OCTOBER TERM, 1886.

---

THE KING OF THE BELGIANS, by CHARLES MALI, Consul, etc., in behalf of JOSEPH WILDENHUS and others,

Appellant,

vs.

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

Appellee.

## Memorandum on Motion to issue Special Citation, &c.

This is a motion for the issue of a special citation, and for leave to return the record on appeal at a day within the present term of the Court, to docket the cause, and to advance the same for hearing at some early day to be assigned by the Court.

The case is an appeal from a final decision of the Circuit Court of the United States for the District of New Jersey, dismissing a writ of habeas corpus, and remanding the prisoners in whose behalf and for whose release it was issued, to the common jail of Hudson County, New Jersey.

The case upon the merits involves, as the papers show, a question of the highest international concern, and imposes upon the Courts of the United States a grave responsibility. A foreign sovereign with whom the United States is at peace appears before a Federal tribunal of this country demanding, by the writ of habeas corpus, the custody of three of his subjects, arrested and confined in prison, whom, it is insisted, are in no manner

amenable to the local law. Obviously, an inconsiderate, hasty or unjust decision would lead to the most serious consequences, and, if reparation be not made, be a cause of war.

But this motion will be discussed without reference to the merits of the main case, and independently of any consideration of the parties involved.

We respectfully submit that the motion should be granted as a matter of good practice, and that such motions ought to prevail in all cases of appeals in cases of habeas corpus where the prisoner sought to be discharged is in custody.

The usual day for the return of citations upon writs of error is the first day of the term, except when the writ is taken upon a judgment rendered less than thirty days before the first day of the term, in which latter case the citation may be returned on the third Monday of the term.

U. S. Supreme Court Rule 8, p. 5.

Citations upon appeals are subject to the same rules and regulations as those upon writs of error.

U. S. Rev. Stats., Sec. 1012.

But this Court has made an exception to this general rule in a class of cases very much less cogently demanding the exception than the class of cases to which this case belongs.

By the act of March 3, 1875, Chap. 137, Sec. 5, 18 Stat. L., 470, Congress provided that orders of the Circuit Courts, dismissing or remanding to the State Courts causes moved therefrom to the Circuit Courts, should be reviewable on writ of error or appeal by this Court.

Act Mar. 3, 1875, 18 Stat., 470.

Inasmuch as writs of error and appeals in the class of cases just mentioned, when brought up under the general rule, were productive of great and unjust delay, and at the same time deprived the party removing the cause of his right to a speedy hearing before the Federal Courts, this Court by its present Rule 32, originally promulgated Jan. 16, 1882, provides that citations upon such writs of error and appeals shall be made returnable at any time within thirty days after date, and also for the advancement of such causes.

U. S. Sup. Ct. Rule 32.

# In the Supreme Court of the United States,

OCTOBER TERM, 1886.

---

THE KING OF THE BELGIANS, by CHARLES MALI, Consul, etc., in behalf of JOSEPH WILDENHUS and others,

Appellant,

vs.

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

Appellee.

## Memorandum on Motion to issue Special Citation, &c.

This is a motion for the issue of a special citation, and for leave to return the record on appeal at a day within the present term of the Court, to docket the cause, and to advance the same for hearing at some early day to be assigned by the Court.

The case is an appeal from a final decision of the Circuit Court of the United States for the District of New Jersey, dismissing a writ of habeas corpus, and remanding the prisoners in whose behalf and for whose release it was issued, to the common jail of Hudson County, New Jersey.

The case upon the merits involves, as the papers show, a question of the highest international concern, and imposes upon the Courts of the United States a grave responsibility. A foreign sovereign with whom the United States is at peace appears before a Federal tribunal of this country demanding, by the writ of habeas corpus, the custody of three of his subjects, arrested and confined in prison, whom, it is insisted, are in no manner

amenable to the local law. Obviously, an inconsiderate, hasty or unjust decision would lead to the most serious consequences, and, if reparation be not made, be a cause of war.

But this motion will be discussed without reference to the merits of the main case, and independently of any consideration of the parties involved.

We respectfully submit that the motion should be granted as a matter of good practice, and that such motions ought to prevail in all cases of appeals in cases of habeas corpus where the prisoner sought to be discharged is in custody.

The usual day for the return of citations upon writs of error is the first day of the term, except when the writ is taken upon a judgment rendered less than thirty days before the first day of the term, in which latter case the citation may be returned on the third Monday of the term.

U. S. Supreme Court Rule 8, p. 5.

Citations upon appeals are subject to the same rules and regulations as those upon writs of error.

U. S. Rev. Stats., Sec. 1012.

But this Court has made an exception to this general rule in a class of cases very much less cogently demanding the exception than the class of cases to which this case belongs.

By the act of March 3, 1875, Chap. 137, Sec. 5, 18 Stat. L., 470, Congress provided that orders of the Circuit Courts, dismissing or remanding to the State Courts causes moved therefrom to the Circuit Courts, should be reviewable on writ of error or appeal by this Court.

Act Mar. 3, 1875, 18 Stat., 470.

Inasmuch as writs of error and appeals in the class of cases just mentioned, when brought up under the general rule, were productive of great and unjust delay, and at the same time deprived the party removing the cause of his right to a speedy hearing before the Federal Courts, this Court by its present Rule 32, originally promulgated Jan. 16, 1882, provides that citations upon such writs of error and appeals shall be made returnable at any time within thirty days after date, and also for the advancement of such causes.

U. S. Sup. Ct. Rule 32.

It was not until the act of Mar. 3, 1885, that appeals to this Court in cases of habeas corpus were authorized to be brought before this Court, and we assume that an occasion had not until this time arose calling for the promulgation of a rule governing these cases similar to that respecting cases remanded by the Circuit Courts to the State Courts.

Act Mar. 3, 1885, 23 Stat. L., 437, amending U. S. Rev. Stats., sec. 764.

The reasons for the granting of this motion are specially forcible.

*First.*—The action of the courts and other authorities of New Jersey are absolutely stayed pending this appeal, and anything done by them concerning the prisoners is declared by law to be null and void.

U. S. Rev. Stats., sec. 766.

*Second.*—If this motion is not granted the prisoners must remain in jail with their case undisposed of, certainly until the October Term of 1887, and then, if the cause is not advanced, for three years longer, owing to the present state of the calendar of the Court.

*Third.*—Although habeas corpus is in itself a civil proceeding, it cannot be denied that this case is essentially criminal in its nature, and, therefore, of a class entitled to preference and advancement under the general rules of this Court.

U. S. Sup. Ct. Rule 26, par. 3.

*Fourth.*—A serious international question is involved, delay in the final adjudication of which may produce a disturbance of the peaceful relations of this Government with a foreign sovereign.

We, therefore, respectfully submit that the motion should be granted.

F. R. COUDERT,
EDWARD K. JONES,
Counsel for Belgium.

It was not until the act of Mar. 3, 1885, that appeals to this Court in cases of habeas corpus were authorized to be brought before this Court, and we assume that an occasion had not until this time arose calling for the promulgation of a rule governing these cases similar to that respecting cases remanded by the Circuit Courts to the State Courts.

Act Mar. 3, 1885, 23 Stat. L., 437, amending U. S. Rev. Stats., sec. 764.

The reasons for the granting of this motion are specially forcible.

*First.*—The action of the courts and other authorities of New Jersey are absolutely stayed pending this appeal, and anything done by them concerning the prisoners is declared by law to be null and void.

U. S. Rev. Stats., sec. 766.

*Second.*—If this motion is not granted the prisoners must remain in jail with their case undisposed of, certainly until the October Term of 1887, and then, if the cause is not advanced, for three years longer, owing to the present state of the calendar of the Court.

*Third.*—Although habeas corpus is in itself a civil proceeding, it cannot be denied that this case is essentially criminal in its nature, and, therefore, of a class entitled to preference and advancement under the general rules of this Court.

U. S. Sup. Ct. Rule 26, par. 3.

*Fourth.*—A serious international question is involved, delay in the final adjudication of which may produce a disturbance of the peaceful relations of this Government with a foreign sovereign.

We, therefore, respectfully submit that the motion should be granted.

F. R. Coudert,
Edward K. Jones,
Counsel for Belgium.

120-1

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886. No. 1288.

THE KING OF THE BELGIANS, BY CHARLES MALI, CONSUL, ETC., ACTING FOR AND IN BEHALF OF JOSEPH WILDENHUS, AND OTHERS, *Appellant,*

*against*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY, *Appellee.*

## BRIEF IN BEHALF OF APPELLANT.

F. R. COUDERT,
EDWARD K. JONES,
*Counsel for Appellant.*

COUDERT BROTHERS,
*Attorneys,*
68 William Street, New York.

# Supreme Court of the United States,

OCTOBER TERM, 1886.

**No. 1288.**

THE KING OF THE BELGIANS, by Charles Mali, Consul, &c., acting for and in behalf of Joseph Wildenhus, and others,

Appellant,

AGAINST

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, New Jersey,

Appellee.

**Appeal from the Circuit Court of the United States for the District of New Jersey.**

## BRIEF IN BEHALF OF THE APPELLANT.

### Statement of the Case.

This is an appeal from the final decision of the Circuit Court of the United States for the District of New Jersey, dismissing a writ of *habeas corpus* sued out by the above-

named appellant in order to obtain the release of Joseph Wildenhus, Giovanni Golubosich and John J. Ostenmeyer, alleged to be unlawfully detained in custody by the appellee under the authority of the State of New Jersey.

The writ was applied for upon two distinct grounds:

FIRST.—Because the prisoners were in custody in violation of a treaty of the United States with the Kingdom of Belgium; and

SECOND.—Because the prisoners, being subjects of a foreign power, and domiciled therein, were in custody by reason of an act done or omitted under an alleged exemption claimed under the sanction of a foreign State, the validity and effect whereof depend upon the law of nations.

The facts of the case are these:

On the tenth of October, last past, there occurred on board of the Belgian steamship "*Noordland*" an altercation between the above-named Joseph Wildenhus and one Henry Figens, in which altercation Wildenhus stabbed Figens with a knife, from the effects of which the latter soon thereafter died. Both parties to the affray were at the time of the crew of the above-mentioned Belgian steamship, subjects of the King of the Belgians, and domiciled within his dominions, and the said Joseph Wildenhus is still such. The affair took place whilst the steamship lay in the Port of New York, moored to her wharf at Jersey City, New Jersey, but occurred and ended wholly below the deck of the ship, without any disturbance whatsoever of the tranquillity of Jersey City, or of the State, and no person or persons other than members of the crew were present, near by, or otherwise concerned.

Record, page 2.

Notwithstanding these facts the police authorities of Jersey City interfered, arrested Wildenhus on the charge

of homicide under the laws of New Jersey, and at the same time took into custody, as witnesses of the affair, the above-named Giovanni Golubosich and John J. Ostenmeyer, also of the crew of the said vessel, all of whom were committed to confinement in the Common Jail of Hudson County, in said State, where they now remain.

Record, page 2.

The consul, Mr. Mali, acting under the directions of his Government, demanded the release of all the prisoners upon the ground that the offense with which Wildenhus stood charged was committed within the jurisdiction of the Kingdom of Belgium, and that under the law of nations and treaties between the United States and Belgium, he, as Consul, had sole authority in the premises.

Record, pages 1, 9 and 10.

The demand of the Consul having been refused, an application was made by him, at the request and with the consent of the prisoner Wildenhus, to the Circuit Judge of the Third Circuit, for a writ of habeas corpus. The Circuit Judge allowed the writ to issue, returnable before the Court at Trenton, on October 15.

Record, p. 3.

The matter came on for hearing before the Court held by the District Judge of Delaware, temporarily assigned to hold the Circuit Court for the District of New Jersey, and on the 9th of November, the Court, by that Judge, made a final order dismissing the writ and remanding the prisoners.

Record, page 14.

From this decision the petitioner appealed to this Court, which appeal was duly allowed by the Circuit Court.

Record, page 14.

We contend that the action of the Court below in dismissing the writ and remanding the prisoners was erroneous.

## Brief of Argument.

The questions raised by the appeal are:

1. Is a crime committed on board a foreign merchant vessel, whilst lying in a port of another nation, by one of the crew upon another of the crew, and without any disturbance of the tranquillity of the port, exclusively cognizable by the authority of the nation to which the vessel belongs, when the right to try the offender is asserted by such nation? In other words, is a foreign merchant vessel, in contemplation of law, so far the territory of the nation to which she belongs, that matters happening on board, civil and criminal, even while such vessel is lying in the port of another nation, (provided such matters do not concern other persons than the officers and crew of such vessel), are within the exclusive control of the nation to which the vessel belongs, when the right to such control is asserted? The precise point is not whether a vessel of one nation by going into the ports of another nation becomes subject to the municipal laws of the latter, as this expression is generally understood to mean. Nor is the question, as it presents itself in this case, whether the State of New Jersey could take cognizance of the crime referred to, in the absence of action by the authorities of Belgium. The question (—to repeat it in another form—), is whether a foreign nation, when it may choose to assert the privilege, has the exclusive right to control the internal order of its own ships, both civil and criminal, even when in the ports of another nation, provided the tranquillity of such other State be not involved, or persons within its jurisdiction concerned?

2. If the first question be answered in the affirmative, have the Federal Courts of the United States authority by the writ of *habeas corpus* to release a person from imprisonment by a State in violation of this privilege?

The order of the Court below, as well as the opinion of the learned Judge, both show that the writ was dismissed

on the ground of a supposed lack of jurisdiction in the Federal Courts to release a prisoner from imprisonment by a State in cases like this.

Record, pages 14, 11.

Ordinarily, therefore, the first question presenting itself for consideration by this Court is the question of jurisdiction. But that question is so involved in the merits of the case, and, for its proper decision, depends so much upon a precise idea of the essential right asserted, that we will reverse the usual order of discussion and consider the question of jurisdiction last.

## I.

THE OFFENSE IN QUESTION IN THIS CASE IS EXCLUSIVELY COGNIZABLE BY THE AUTHORITY OF THE KINGDOM OF BELGIUM.

(1.) Under the general rules of international law, to which the practice of the United States conforms; and

(2.) By virtue of treaties between the United States and Belgium.

### (1.)

(*a.*) *The jurisdiction of Belgium is exclusive under the general rules of international law.*

Before entering into the argument, we may premise a few general observations:

Mr. Chancellor Kent, in opening his Commentaries, and treating the subject of the law of nations, says:

" When the United States ceased to be a part of the British Empire, and assumed the character of an independent nation, they became subject to that system of rules

which *reason, morality and custom* had established among the civilized nations of Europe, as their *public law.* During the War of the American Revolution, Congress claimed cognizance of all matters arising upon the law of nations, and they professed obedience to that law, according to the general usages of Europe. By this law we are to understand that code of public instruction which defines the right, and prescribes the duties of nations in their intercourse with each other. *The faithful observance of this law is essential to national character and the happiness of mankind.*"

1 Kent's Com., 1.

Mr. Wheaton, in his work on International Law, says:

"International law, as understood among civilized nations, may be defined as consisting of *those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations,* with such definitions and modifications as may be established by general consent."

Wheat. Int. Law (Dana's Ed.), sec. 14;
See also Halleck, Int. Law, 42;
1 Kent's Com., 3;

The *sources* and *evidence* of international law, aside from written conventions and treaties, are the *text writers of authority,* showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.

Wheat. Int. Law (Dana's Ed.), sec. 15;
1 Kent Comm., 18, 19;

In another place, Mr. Chancellor Kent further says:

"No civilized nation, that does not arrogantly set all ordinary law at defiance, will venture to disregard the uniform sense of the established writers on international law. England and the United States have been equally disposed to acknowledge the authority of the works of jurists writing professedly on public law, and the binding

force of the general usage and practice of nations, and the still greater respect due to judicial decisions, recognizing and enforcing the law of nations. In all our foreign negotiations and domestic discussions of questions of national law, we have paid the most implicit respect to the practice of Europe, and the opinions of her most distinguished civilians."

1 Kent Comm., 19.

The law of nations is a part of the law of the land, and is obligatory upon the Courts of the United States.

*The Amelia*, 1 Cranch, 1; S. C., 4 Dall., 34;
Murray *vs.* *The Charming Betsy*, 2 Cranch, 64, 118;
*The Nereide*, 9 Cranch, 388;
*The Estrella*, 4 Wheat., 298;
Holmes *vs.* Jennison, 14 Peters, 540, 569;
Henfield's Case, Whart. St. Tr., 49–66;
7 Op. Attys. Gen. U. S., 18; *Id.*, 27; *Id.*, 229.

The modern authoritative writers upon this branch of the law, although a different view formerly obtained, are very clear and explicit upon the precise question involved here.

The general rule is well established, that the vessels of a nation are to be considered as a part of its territory, and the persons on board of them are deemed to be within the jurisdiction of such nation, and are protected and governed by the laws of the country to which such vessel belongs.

Vattel. Law of Nations, Book 1, c. 19, sec. 216;
Wheat. Elements Int. Law, 3d Edn., 157;
Wheat. Int. Law, 8th Edn., sec. 106;
1 Kent. Comm., 26;
Crapo *vs.* Kelly, 16 Wall., 610;
*In Re* Ah Sing, 13 Fed. R., 286;
*In Re* George Moreau, 15 Fed. R., 44;

Mr. Polson, in his work on the Law of Nations, states it as an established rule that "the judicial power of every

State"—(with certain exceptions not now pertinent)—"extends, 1. To the punishment of offenses against the laws of the States committed by foreigners as well as subjects within its territory, *or on board its vessels on the open seas or in foreign ports*, and to the punishment of piracy and other offenses against the law of nations. 2. To all civil proceedings *in rem*." etc., etc.

Polson's Int. Law, 25, (Phila. Law Library, vol. 78, O. S.; Vol, 62, N. S.)

But the Continental jurists and publicists whose writings are in the French language have given this point the most thorough and minute discussion.

M. Massé, in his work on the "Commercial Law in its relation to the Law of Nations and the Civil Law" (Second Edition, Paris, 1861), vol. 1, pp. 421, 423, discusses the question with great precision and force. He says:

"When a crime or an offense has been committed on board of a foreign vessel, which at the time of the perpetration of the crime is at sea near a shore, or in a port or a harbor belonging to another power, two principles, are in conflict: one which considers a vessel as a continuation of the territory of the nation under whose colors it sails, and another which attributes exclusive jurisdiction to the sovereign throughout the whole extent of his territory. It is manifest that in such a case, one of the jurisdictions can be maintained only to the detriment of its rival.

"The authority is then to be divided, attributing to each, all that is necessary for the preservation of its safety and its sovereignty, and for that purpose a distinction is to be made between crimes and offenses which disturb the order of the place where the foreign vessel is, and those which disturb only the order of the ship. The former belong to the territorial jurisdiction, the latter are cognizable only by the nation to which belongs the vessel or the flag.

"This distinction was followed in two remarkable instances. In 1806, two American ships, the "*Newton*" and the "*Sally*," were at anchor, one at Antwerp, and the other at Marseilles. A brawl took place in the yawl of the "*New-*

*ton*" between two sailors of that ship; and the mate of the "*Sally*" wounded seriously one of the sailors who had disobeyed his orders. These facts were of a nature to lead to criminal prosecutions. A conflict arose between the French authorities and the Consuls of the United States at the ports of Marseilles and Antwerp, who claimed to have exclusive jurisdiction over their countrymen. Upon this conflict, the Council of State, on the 20th November, 1806, gave an opinion which admitted the claim of the Consuls and forbade the French tribunals to take cognizance of these two cases, considering that if a foreign vessel is admitted in a port of the State, it is of right submitted to the laws of police regulating the place where it is admitted; also that if its crew is amenable to the tribunals of the country for the offenses which they there commit, even on board the ship, against persons not of the crew, yet it is otherwise in case of offenses committed on board the foreign vessel by a man of the crew against another man of the same crew, because it concerns the internal discipline of the vessel, in which the local authority should not interfere when its assistance is not called for, or the tranquillity of the port is not broken.

"A similar decision was rendered in 1837, by the Minister of Justice and the Minister of Foreign Affairs in a case of poisoning by a man of the crew of another man of the crew on board of the Swedish ship "*Forsattning*," at anchor in the Loire, in the harbor of Paimboeuf."

The Court will also find a most elaborate discussion of the subject in M. Ortolan's work entitled "Regles Internationales et Diplomatie de le Mer," (4th Ed., Paris, 1864), Vol. I., chap. 13. pp. 252, 292.

Mr. Halleck, an American writer of acknowledged authority, also expresses a view in accordance with our contention. After discussing the case of a vessel having on board an offender whose crime was commited at sea, and the vessel afterwards driven by stress of weather into the port of another country, he proceeds:

"But the rule of law, and the comity and practice of nations, go much further than these cases of necessity, and allow a merchant vessel of one State, coming into an

open port of another voluntarily for the purpose of lawful trade, to bring with her, and keep over her to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding to this extent by consequence the jurisdiction of the local law. *This jurisdiction of a nation over its vessels while lying in the port of another is wholly exclusive.* For any unlawful acts done by *her* while thus lying in the port of another State, and for all contracts entered into while there by her master or officers, *she* is made answerable to the laws of the place. Nor if her master or crew, while on board in such port *break the peace of the community* by the commission of crimes, can exemption be claimed for them. But the comity and practice of nations have established the rule of international law that such vessel so situated is, for the general purpose of governing and regulating the rights, duties and obligations of those on board, to be considered as a part of the territory of the nation to which she belongs. The local authorities, therefore, have a right to enter on board of a merchantman in port, for the purpose of inquiry universally, *but for the purpose of arrest only in matters within their ascertained jurisdiction.* It therefore follows that *with respect to matters happening on board which do not concern the tranquillity of the port,* or persons foreign to the crew, or acts committed on board while such vessel was on the high seas, *are not amenable to the territorial justice. All such matters are justiciable only by the courts of the country to which the vessel belongs.* So firmly is this doctrine *incorporated into the practice of nations* that the French regard it as a positive rule of international law, and the French laws do not hesitate to prescribe that when crimes are committed on board a French vessel in a foreign port, by one of the crew against another of the same, the French consul is to resist the application of the local authority to the case."

Halleck Int. L., 172, 173;

See also De Clerq et Vallet, Guide Pratique, tom 1, p. 366;

De Clerq, Formulaire, tom 2, p. 65;

Requelme, Derecho Internacional, tom 1, pp. 243-245.

(*b.*) *The doctrine of the general international law is also in accordance with the established practice of the United States.*

In commenting on the cases of the "*Newton*" and the "*Sally*" referred to by M. Massé in the foregoing extract, M. Ortolan in the work last referred to (Vol. I., p. 272), very forcibly and pertinently observes:

"These two cases are interesting from another point of view which shows that the Americans, contrary to the opinion of one of their writers on international law, Mr. Wheaton, claim national jurisdiction of offenses committed on board of their merchant vessels in a foreign port, when these offenses have taken place only between the men of the crew, and the tranquillity of the port has not been broken; *in other words this maritime power adopts the same principles that we do.*"*

The action of our Government, through its Consuls at Antwerp and Marseilles, in the cases of the "*Newton*" and the "*Sally*," in 1806, was soon afterwards followed by legislation affirming the principle of international law, declared and assented to by the two nations in those cases.

The Crimes Act of March 3, 1825, chap. 65, after defin-

* So strongly established is the rule enunciated in the cases of the "*Sally*" and the "*Newton*," (*supra*), that Mr. Wheaton, certainly the most eminent American publicist writing upon the subject, and one of the most eminent in the whole world, afterwards found it necessary to give his assent and sanction to the principle for which we now contend. Again referring to Mr. Wheaton, M. Ortolan, in a note to the place last quoted from, alludes to the alteration which Mr. Wheaton afterwards made in his original views upon this question. M. Ortolan says:

"In the elaborate notice which he did me the honor to write in 1845, on the first volume, first edition, of my "International Rules," Mr. Wheaton admits that the general principle laid down by him is susceptible of some exceptions. 'I believe,' says he in that notice, 'that on that point the legislation and the jurisprudence of France have established the true distinctions which should be acknowledged by all nations as the most in conformity with the principles of the universal law of nations.' Review of French and Foreign Law, March, 1845."

Mr. Wheaton's modification of his first opinion upon this subject is also alluded to in the recent editions of his work on International Law.

Whea'. Int Law (Lawrence's ed.), note 67, foot of page 191;
Wheat. Int. Law (Dana's ed.), note 58, to sec. 95;

The rule in question is stated by Wheaton on page 201 of Lawrence's edition, and in section 102 of Dana's edition.

ing certain crimes committed at sea and other places within the admiralty jurisdiction of the United States, proceeds as follows:

"Sec. 5. And be it further enacted, that if any offense shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, *while lying in a port or place within the jurisdiction of any foreign state or sovereign*, by any person belonging to the company of said ship, or any passenger, on any other person belonging to the company of said ship, or any other passenger, the same offense shall be cognizable and punishable by the proper Circuit Court of the United States, in the same way and manner, and under the same circumstances, as if said offense had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or state; provided, always, That if such offender shall be tried for such offense, and acquitted or convicted thereof, in any competent court of such foreign state or sovereign, he shall not be subject to another trial in any court of the United States."

4 Stat. Large, pp. 115–16.

The Act of 1825 is carried into the present Revised Statutes, and the section here referred to reproduced in sections 730, 5339 and 5345 of the latter.

Since the passage of the Act of 1825, numerous convictions have been had in Federal Courts for crimes committed on board American vessels in foreign ports.

See, among others, U. S. *vs.* Stevens, 4 Wash. C. C., 547;
U. S. *vs.* Roberts, 2 N. Y. Leg. Obs., 99;
U. S. *vs.* Seagrist, 4 Blatch., 420;
U. S. *vs.* Bennett, 3 Hughes, 466;

In the case last cited, the rule is explicitly asserted that "the law of the United States follows an American vessel wherever she may be on navigable waters, so that an offense committed on board such vessel is an offense against the United States, *though the vessel be in a harbor or river of a foreign country.*"

The Act of 1825 was followed in 1833 by the instructions issued by Mr. Livingston, as Secretary of State, to the consuls of the United States in foreign countries.

Article 36 of those instructions is as follows:

"Art. 36. Where piracy, mutiny, or any other offense against the laws of the United States shall have been committed on board of any vessel of the United States coming into the consular district, it is the duty of the consul, after taking the depositions necessary to establish the facts, to apply to the local authorities for means of securing the offenders while they remain in port, and to provide the means of sending them, without delay, to the United States for trial; and in all such cases where the vessel, on board which the offense was committed, is not bound to the United States, the consul is directed to procure two of the principal witnesses to be sent home with the person accused; and he is, at the same time, to transmit certified copies of all the depositions he has taken in relation to the offense; an exact detail of all its circumstances; and such information as may be necessary to secure the conviction of the offenders."

See U. S. Consular Regulations of March 2, 1833.*

The position of the United States upon this question is still further shown by a letter written August 1, 1842, by Mr. Webster, Secretary of State, to Lord Ashburton, British Minister, in the case of the "*Creole*." We extract from that communication the following:

"A vessel on the high seas, beyond the distance of a maritime league from the shore is regarded as part of the territory of the nation to which she belongs, and subject exclusively to the jurisdiction of that nation. If, against the will of her master or owner, she be driven or carried nearer to the land, or even into port, those who have, or

* NOTE.—The consular regulations issued since 1833, except those of 1874, have not been within the reach of counsel preparing this brief. The Regulations of 1874 embody the substance of Article 36 of 1833, in sections 172, 173, 174, 175, 194, 195, 196, 197, 198 and 199.

ought to have control over her, struggling all the while to keep her upon the high seas, and so within the exclusive jurisdiction of her own government, what reason or justice is there in creating a distinction between her rights and immunities in a position thus the result of absolute necessity, and the same rights and immunities before superior power had forced her out of her voluntary course.

"But, my Lord, the rule of law, and the comity and practice of nations, go much further than these cases of necessity, and allow even a merchant vessel, coming into any open port of another country voluntarily, for the purposes of lawful trade, to bring with her, and keep over her to a very considerable extent, the jurisdiction and authority of the laws of her own country, excluding to this extent, by consequence, the jurisdiction of the local law. A ship, say the publicists, though at anchor in a foreign harbor, preserves its jurisdiction and its laws. It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the State retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels, even in parts of the sea subject to a foreign dominion.

"This is the doctrine of the law of nations clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations.

"If a murder be committed on board of an American vessel by one of the crew upon another, or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign State or sovereignty, the offense is cognizable and punishable by the proper court of the United States, in the same manner as if such offense had been committed on board the vessel on the high seas. The law of England is supposed to be the same.

"It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not consider or so assert it. For any unlawful acts done by her while thus lying in port and for all contracts entered into while there by her master or owners, she and they must, doubtless,

be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself."

Webster's Diplomatic and Official Papers, p. 83.

From what has been observed above, we respectfully submit that the point for which we contend in this branch of the case is abundantly established.

To conclude, we quote the pertinent words of M. Ortolan:

"This principle" (established by the American and French powers in the cases of the "*Newton*" and the "*Sally*)," "*becomes particularly decisive* when addressed to a power which not only profits by it, but when opportunity presents itself, claims it as lawfully due."

Ortolan, "Diplomatie de la Mer," 4th Ed., vol. 1, p. 281.

(2.)

*The offense in question is exclusively cognizable by the authority of Belgium by virtue of treaties existing between that country and the United States.*

The special provisions of the treaties under which this proceeding is brought are as follows:

ARTICLE XI.—"Consuls-General, Consuls, Vice Consuls, and Consular Agents shall have exclusive charge of the in-

ternal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. Neither the Federal, State, or Municipal authorities, or Courts in the United States, nor any Court or authority in Belgium, shall, on any pretext, interfere in these differences."

U. S. Treaties, page 65.

As the Kingdom of Belgium, in its language, laws and political history, is so intimately connected with the late Kingdom and present Republic of France, it may be useful, in order to arrive at a proper interpretation of the meaning of this article of the Belgian treaty, to recur to similar provisions to be found in the treaties of France with the United States.

The earliest provision upon the subject in question in a treaty to which the United States was a party, is to be found in the 8th Article of the treaty between this country and France of November 14, 1788. That Article is as follows

ARTICLE VIII.—"The Consuls or Vice-Consuls shall exercise police over all the vessels of their respective nations, and shall have on board the said vessels all power and jurisdiction in civil matters in all the disputes which may there arise; they shall have an entire inspection over the said vessels, their crew, and the changes and substitutions there to be made; for which purpose they may go on board the said vessels whenever they may judge it necessary. Well understood that the functions hereby allowed shall be confined to the interior of the vessels and that they shall not take place in any case which shall have any interference with the police of the ports where the said vessels shall be."

U. S. Treaties, p. 222

The same provision was in substance reënacted by the treaty between the United States and France of February

23, 1853. The 8th Article of the latter treaty is as follows:

ARTICLE VIII.—"The respective Consuls-General, Consuls, Vice-Consuls, or Consular Agents, shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences, but shall lend forcible aid to the Consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the Consuls addressed in writing to the local authority, and supported by an official extract from the register of the ship or the list of the crew, and shall be held during the whole time of their stay in port, at the disposal of the Consuls. Their release shall be granted at the mere request of the Consuls made in writing. The expenses of the arrest and detention of those persons shall be paid by the Consuls.

U. S. Treaties, p. 251."

It will be observed that in every substantial respect the article of the Belgian treaty now in question is in the same terms as that of the French.

In commenting upon the French treaties relative to the subject in question, M. Ortolan says:

"Various public treaties contain special clauses relative to the right of police, and of jurisdiction on French merchant vessels in foreign ports. *Notwithstanding differences in the wording, the most important and recent are drawn in accordance with the spirit of the preceding principles, that is to say, in the sense of a distinction to be made between crimes or offenses which do not extend beyond the interior and between men of the crew of the vessel, and those which concern the police of the port and*

*compromise its tranquility.* Such was already in 1788 the convention of the 14th November between France and the United States."

Ortolan, "Diplomatie de la Mer," 4th Ed., Vol. I, p. 278.

We contend that the right of the Belgian Consul in the present case is, according to a fair and just interpretation, to be found in the first clause of the treaty, which confers upon him the "*exclusive charge of the internal order of the merchant vessels of his nation.*"

A striking confirmation of this contention is to be found in the very words of an eminent writer from whose works we have quoted; and it is a notable coincidence that the language of that distinguished publicist and of the treaty itself are precisely the same.

M. Massé, in the passage given in a former part of this brief, says:

"A distinction is to be made between crimes and offenses which disturb the order of the place where the foreign vessel is, and those which disturb only *the internal order of the ship*—[et ceux qui ne portent atteinte qu'a *l'ordre interieur du batiment*—]. The former belong to the territorial jurisdiction; the latter are cognizable only by the nation to which belongs the vessel or the flag."

Massé (*supra*).

Further on, in speaking of the cases of the "*Newton*" and the "*Sally,*" the same author, after referring to crimes that affect the police of the port, says:

"It is otherwise in case of offenses committed on board of the foreign vessel by a man of the crew against another man of the same crew, because it concerns *the internal discipline of the vessel*—[parce qu'il s'agit alors *de la discipline interieure du vaisseau*]—in which the local authority should not interfere when its assistance is not called for, or the tranquillity of the port is not broken."

Massé, (*supra*).

Mr. Dana, in the note to that passage in Wheaton's

work, which was afterwards qualified in an article in the "Revue Etr. et Franç," (referred to *supra*), says: "The treaty of 1853, between France and the United States, adopts, as to private vessels, substantially the distinction made in the French law as laid down and explained in section 102. The state of international law on the subject of private vessels in foreign ports is judiciously explained by Mr. Halleck in his treatise, pp. 171–2, (quoted *supra*). It may be said to be this: So far as acts done at sea before her arrival in port, and acts done in port, by members of the crew to one another, and so far as regards the general regulation of the rights and duties of those belonging on board, the vessel is exempt from local jurisdiction; but if the acts done on board affect the peace of the country in whose port she lies, or the persons or property of its subjects, to that extent the State has jurisdiction. The local authorities have a right to visit all such vessels, to ascertain the nature of any alleged occurence on board. Of course, no exemption is ever claimed for injuries done by the vessel to property or persons in port, or for acts of her company not done on board the vessel, or for their personal contracts or civil obligations or duties relating to persons not of the ship's company."

See Wheat. Int. L. (by Dana). Note to sec. 95, p. 153.

The language of the French treaty here referred to by Mr. Dana is precisely the same as that of the treaty with Belgium.

In construing a treaty, courts take into consideration the situation of the parties to it, the subject involved, and the intention of the parties; *and to ascertain this intention, may consider the construction which the parties have given to it, and what has been their action under it.*

United States *v.* Payne, 8 Fed. R., 883.

And this Court has lately held that where a treaty admits of two constructions—one restrictive of the rights

that may be claimed under it, and the other liberal—*the latter is to be preferred.*

Hauenstein *v.* Lynham, 100 U. S., 483.

Now, what was the intention of the parties, and what has been the construction placed upon the same provisions contained in the treaties with France from 1788 down to the present time?

The answer is to be found in the action of the two governments in the cases of the "*Newton*" and the "*Sally*" in 1806; the enactment of the United States Crimes Act of 1825; the establishment of the Consular Regulations upon the subject in 1833, by Mr. Livingston, the United States Secretary of State; and the continuous and unbroken practice of the United States and France since, as shown in what has been already said above.

The same view is exhibited on the part of Belgium, as evinced in the Consular Instructions upon which this proceeding is founded, and which are printed in the Record, at pages 9 and 10.

Can the United States or its Courts deny this interpretation to precisely the same words in the treaty with Belgium?

What other reasonable interpretation is to be given to this treaty?

If the legislation of a State in a charter to a municipal corporation should grant to it authority to "exercise police over all" the territory included within its limits, or should grant to it "exclusive charge of the internal order" of the municipality, could it be reasonably said that limits as to the *quality* or *degree* of offenses which might be committed were imposed by such language?

And yet an argument leading to this result has been made in this case. It was admitted by the learned counsel for the State in his argument before the Court below, as we understood him, that in cases of mutiny or ordinary assaults and batteries, the Consul might have the right to interpose; but in the higher grades of crime, such as

homicide, the right could not be claimed, for in such cases the offense must be tried by the local courts.

The answer to this is very simple. The treaty makes no such distinction. And if such a distinction had been intended it was an easy matter to declare it.

If we misunderstood the learned counsel, and if no such argument is advanced in this Court, then, as it seems to us, the only argument possible to make against the claim of the Consul in this case, is waived; for certainly the provision in question means to confer upon the Consul at least some measure of police power.

The measure of this authority is the main question in this case.

Applying a reasonable construction to the words of the treaty, independently of the contemporaneous state of the general international law, they must be accorded something more than an ordinary signification. The words, obviously, do not mean to confer upon the Consul merely an authority similar to that of a parent over his child, or a master over his servant, nor the corrective authority of a schoolmaster over his pupils. *That authority is possessed by the Master of the ship independently of the Consul;* and if this is all that the framers of the treaty intended, then their work was pure superorogation and idle ceremony.

The other clause of the treaty providing that the Consul "shall alone take *cognizance of differences* which may arise," is equally against such a contention as that to which we have just alluded.

The meanings of the word "*différence*," as stated by Webster's Dictionary are, "distinction; dissimilarity; dissimilitude; variation; diversity; variety; contrariety; *disagreement; variance; contest; contention; dispute; controversy;* debate; *quarrel; wrangle*; *strife.*

The correlative "*differends*" used in the French version of the treaty, as defined by the French lexicographers, is equally strong, if not stronger.

So that if these words, "disagreement," "variance," "contest," "contention," "dispute," "controversy," "quarrel," "wrangle" and "strife," had been inserted in

the treaty itself, its meaning would not have a broader effect than it has in its present form.

Another significant fact tending to show that the principle of international law claimed by the United States and conceded by France in the cases of the "*Newton*" and the "*Sally*," and afterwards embodied in the Act of 1825, and in the Consular Regulations of 1833, is now to be considered as embodied in the section of the treaty with Belgium presently in question, is the modification of the wording of Consular Regulations of the United States in their more recent form.

As we have before shown, the principle contended for was first embodied in the treaty with France in 1788, but it was not until a comparatively recent period that it became a part of the conventional law between this country and other nations.

Meantime the cases of the "*Newton*" and the "*Sally*" arose, and were decided in favor of the contention of this government, Congress passed the Act of 1825, and Mr. Livingston issued his Consular Regulations of 1833.

All these events occurred before the rule had been carried into treaties with other countries.

Hence Mr. Livingston, in 1833, issued his Consular Regulations in a form assuming the doctrine in question to be a principle of the general international law, and claiming its recognition independently of any treaty stipulation.

See Article 36, Consular Regulation, 1833 (*supra*).

Since then, however, treaties similar to that in question in the present case have been made with many of the great commercial nations of the world,* and the recent consular regulations are so framed as to assume that, the

---

* Treaties embodying provisions upon this subject, have been since made as follows: Austria, May 8, 1848, Art. 4; Belgium, December 5, 1868, Art. 11; Denmark, July 11, 1861, Art. 1; Dominican Republic, February 8, 1867, Art. 26; German Empire, December 11, 1871, Art. 13; Greece, December 10–22, 1837, Art. 12; Italy, February 8, 1868, Art. 11; Netherlands, January 22, 1855, Art. 12; Portugal, April 23, 1841, Art. 10.

Those nations with whom we have no specific treaties enjoy the same privileges under the "most favored nation" clauses of their respective treaties.

PHILADELPHIA BAR ASSOCIATION

principle being now so well established by conventional law, it is no longer necessary to embody and codify it in the instructions issued from the Department of State.

The Consular Regulations of 1874 upon this subject, as far as at present necessary to notice, are as follows:

172. In the absence of a treaty or convention with the power within whose dominions the Consul resides, he has no jurisdiction over disputes between masters, officers and crew, except a permissory one.

173. Exclusive jurisdiction in such cases has been conferred by treaty or convention with several powers, as previously enumerated in these regulations. [See section 34, which includes Belgium.]

174. It is also conferred in the more extended jurisdiction given by the treaties and conventions with various Oriental powers, as already stated.

175. In come cases this jurisdiction is limited to disputes about wages. In other cases it is extended to all disputes, whether growing out of tort or contract. Consuls are referred to the terms of the treaties or conventions in each case for the extent of their jurisdiction. A copy of each may be found in the appendix.

* * * * * * *

194. In some of the conventions or treaties with foreign powers (as will be seen by reference to the text of them in the appendix) the Consular officer of the United States is authorized to require the local authorities to render forcible aid, and to imprison the crew, if he deems it necessary.

195. He may also in some cases call upon them to render forcible assistance for the preservation of order, and keeping the peace.

196. Reference is made to each particular treaty or convention for the powers of consuls in each case.

United States Consular Regulations, 1874.

We say that these modified instructions show that the rule of general international law, originally laid down in the

cases of the "*Newton*" and the "*Sally*," and asserted in this case, is considered by the United States as being embodied in all the recent treaties with foreign nations, in which the present treaty with Belgium is included.

If this be not so, then the United States has receded from its position in the cases of the "*Newton*" and the "*Sally*," and repudiated the Act of 1825, and Article 36 of the Consular Regulations of 1833.

There is no evidence to show such recession and repudiation.

On the contrary, the tendency of the whole history of the Government has been in the direction of enlarging and extending the immunities and exemptions of its citizens from the authority of foreign nations.*

The attidude and action of the Executive Department of the Government upon questions of foreign relations furnishes a rule for observance by the Judicial Department, and in all cases that may arise with regard to questions of international law it is the duty of the Courts to adopt the determination of the other branch of the

---

* The instances in which the Government of the United States has exhibited its zeal for the supposed rights and privileges of its citizens on board of American vessels and in foreign countries would furnish material for an interesting review.

The resistance of the alleged Right of Visitation and Search; the summary enforcement of the claims of American citizens against France by President Jackson; the affair of Martin Koszta, in which the rights of American citizenship were so vigorously defended by Mr. Secretary Marcy, and afterwards by Mr. Webster; the case of the *Creole*; the course taken in regard to alleged acts of injustice done to American citizens in Cuba, in Mexico and in South America, and the recent case of Cutting—all these cases are historic, and demonstrate the extreme sensitiveness of this Government to any infraction of the rights and privileges appertaining to American citizenship or domicile.

The principles of international law have been asserted in all these cases to their uttermost consequences.

In the case of Martin Koszta, a Hungarian, who had declared in New York his intention of becoming an American citizen, and who had been arrested and detained by the Austrian consul at Smyrna, Captain Ingraham, the Commander of the United States sloop-of-war, *St. Louis*, appeared before the city and demanded the release of Koszta within three hours, or he would bombard the city. For his action in this regard Captain Ingraham received the thanks of Congress, and, by a joint resolution of that body of August 4, 1854, the President was requested to present him with a gold medal.

Government upon such questions as the basis of their decisions.

U. S. *vs.* Palmer *et al.*, 3 Wheat., 634;
*The Divina Pastora*, 4 Wheat., 52, 63;
*The Santissima Trinidad*, 7 Wheat., 283, 337;
Foster *vs.* Neilson, 2 Peters, 253, 307.
See also the able review of the decision of the Supreme Court of New York in the McCleod case, written by Judge Tallmadge and published in the Appendix to vol. 26 Wendell's Reports, p. 663, 684.

The learned Judge below, in his opinion, took the ground that the word "differences" could not be construed to embrace crimes, because a subsequent clause of the treaty provides that the Courts of neither country shall on any pretext interfere in such matters, and the treaty itself omits to provide for a Consular Court, and does not in terms authorize the Consul to sit as a committing magistrate.

The answer to these points is, as we understand the case, very simple indeed.

The words "neither the Federal, State or municipal authorities or Courts of the United States, nor any Court or authority in Belgium shall, on any pretext, interfere in these differences," are framed in the form often used in treaties, and are to be taken to have a *reciprocal* meaning They are intended to signify that the Courts of neither nation will interfere *as against the other* in such "differences."

As to the argument of the learned Judge founded upon the absence of a provision for a Consular Court in the treaty itself, it will be observed that the Consul does not rest this claim upon the treaty alone, but upon the power conferred upon him by the law of his nation as exhibited in the Belgian Consular Regulations, which were produced and proved in evidence before the Court below.

Article 9 of those regulations is as follows:

"Art. 9.—Except in case the peace of the port shall have been broken by the event, the consul shall object to

all attempt that the local authority may make to act in relation to crimes or offenses committed on board of a Belgian vessel, by a man of the crew on another man of the same crew, or of the crew of another Belgian vessel.

"He shall take the proper steps to obtain that the cognizance of the case be turned over to him, in order that it be ultimately tried under the Belgian laws."

Record, pp. 9 and 10.

Acting under these instructions, the Consul does not claim jurisdiction, but, on the contrary, to hold the prisioner, if cause should appear to exist, for the action of the home authorities.

Upon this subject we again quote M. Ortolan :

"The right of police is distinct from the right of jurisdiction and, as a deciding power, embraces only simple measures of discipline and good order, or offenses of slight importance; and, relatively to more serious crimes and offenses limits, itself to the power of ferretting and ascertaining them, of taking evidence in relation thereto, of having the perpetrators arrested, in a word of doing all that is necessary to deliver the accused to the competent tribunals, and to enable those tribunals to decide; this right of police as to the determination of national sovereignty to which it belongs, should proceed in concert with the right of jurisdiction.

"Accordingly, in France, as regards French merchant vessels in foreign countries, it is regulated so as to harmonize with the principles established by the advice of the Council of State of 1806."

Ortolan, Diplomatie de la Mer, 4th Ed., Vol. I., p. 276.

We cannot imagine that it will be seriously doubted that Belgium has power to define the authority of her consuls. If so, then that authority can be created outside the treaty as well as by it.

## II.

THE FEDERAL COURTS HAVE POWER TO RELEASE THE PRISONERS BY WRIT OF HABEAS CORPUS.

The writ of *habeas corpus* is regulated as to prisoners in custody under the authority of the States by Section 753 of the Revised Statutes of the United States, as follows:

"Sec. 753.—The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States; or, *being a subject or citizen of a foreign State and domiciled therein, is in custody for an act done or omitted under an alleged* right, title, authority, *privilege, protection, or exemption claimed under the* commission or order, or *sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations;* or unless it is necessary to bring the prisoner into Court to testify."

If we have shown to the satisfaction of the Court that the right sought to be exercised by the Consul of Belgium is within the treaty, then nothing further remains to be said.

If we have not shown this, and the Court is satisfied that the prisoners are entitled to be released under the general international law, then the Court has power to grant the writ under the fifth clause of the section of the Revised Statutes quoted above, because it appears:

(*a.*) That the prisoners are subjects of a foreign State, and are domiciled therein;

(*b.*) That they are in custody for an act done by the offender in custody, while under an exemption from local jurisdiction, and that he claims the privilege of a trial by the authority of his own government;

(*c.*) That this exemption and this privilege are set up under the sanction of the laws of a foreign State; and

(*d.*) That the validity and effect of the same depend upon the law of nations.

Section 753 of the Revised Statutes quoted above is founded on the Act of Congress, approved August 29, 1842.

A recurrence to the original act will be instructive if only to observe that whilst in the revision the substance of the act is stated as if *restricting* the jurisdiction of the Federal Courts in such cases, the original act is in the line of *enlarging* the jurisdiction theretofore enjoyed.

The title and full text of the Act of 1842, are as follows:

"Chap. CCLVII.—An Act to provide further remedial justice in the Courts of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That either of the justices of the Supreme Court of the United States, or judge of any District Court of the United States, in which a prisoner is confined, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases of any prisoner or prisoners in jail or confinement, where he, she or they, being subjects or citizens of a foreign state, and domiciled therein, shall be committed or confined, or in custody, under or by any authority or law, or process founded thereon, of the United States, or of any one of them, for or on account of any act done, or omitted under any alleged right, title, authority, privilege, protection or exemption, set up or claimed under the commission or order, or sanction, of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof. And upon the return of the said

writ, and due proof of the service of notice of the said proceeding upon the Attorney-General or other officer prosecuting the pleas of the State, under whose authority the petitioner has been arrested, committed, or is held in custody, to be prescribed by the said justice or judge at the time of granting said writ, the said justice or judge shall proceed to hear the said cause, and if, upon hearing the same, it shall appear that the prisoner or prisoners is or are entitled to be discharged from such confinement, commitment, custody or arrest, for or by reason of such alleged right, title, authority, privileges, protection or exemption, so set up and claimed, and the laws of nations applicable thereto, and that the same exists in fact, and has been duly proved to the said justice or judge, then it shall be the duty of the said justice or judge forthwith to discharge such prisoner or prisoners accordingly. And if it shall appear to the said justice or judge that such judgment or discharge ought not to be rendered, then the said prisoner or prisoners shall be forthwith remanded: *Provided, always*, that from any decision of such justice or judge an appeal may be taken to the Circuit Court of the United States for the District in which the said cause is heard; and from the judgment of the said Circuit Court to the Supreme Court of the United States on such terms and under such regulations and orders as well for the custody and appearance of the prisoner or prisoners as for sending up to the appellate tribunal a transcript of the petition, writ of *habeas corpus* return thereto, and other proceedings, as the judge hearing the said cause may prescribe; and pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against said prisoner or prisoners, in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of *habeas corpus* shall be deemed null and void.

Approved August 29, 1842."

5 Stat. L., p. 539.

So far as our researches have extended, this act has never been judicially construed in any case like the one in hand.

The legislation arose out of the case of Alexander McLeod, a British subject, who was indicted in February, 1841, at the Niagara General Sessions, of the State of New York, and charged with the murder of one Amos Durfee, under the following circumstances: During the possession by British insurgents of Navy Island, in the Niagara River, in the winter of 1837, an expedition was fitted out under the Colonial authorities of Canada for the destruction of a steamboat, which was suspected to have been used in conveying warlike stores to the island. The boat was captured whilst moored on the American shore of the river, and burnt, and during the melee, Durfee, an American citizen, was killed.

The Courts of New York held that McLeod, who was charged with having belonged to the expedition, and who was subsequently arrested, was liable to be proceeded against in that State for both arson and murder.

The case created great excitement at the time, and threatened serious international complications with Great Britain.

The decision of the Supreme Court of New York will be found reported in 25 Wendell, 483–603, and is severely reviewed in an article from the pen of Judge Tallmadge, of the Superior Court of New York City, to be found in the appendix of vol. 26, Wendell, p. 663.

The primary object of the bill before Congress, which ultimately resulted in the Act of 1842, above set forth, as stated by Mr. Berrien, the Chairman of the Senate Judiciary Committee, was to take from the jurisdiction of the States cognizance of such questions as those which grew out of the McLeod case.

*Congressional Globe*, 2d Session, 27th Congress, p. 444.

Mr. Choate, who favored the measure, offered amendments which, from the report, appear to have been in the way of enlarging the purview of the original draft of the bill, as reported by the Judiciary Committee.

*Congressional Globe*, 2d Session, 27th Congress, pp. 441, 443, 444.

The course of the debate in the Senate is instructive.

The report of Mr. Berrien's speech is, among other things, as follows:

"He maintained that the framers of the Constitution, in convention, manifested an extraordinary solicitude to vest in the Federal jurisdiction the right of deciding upon all cases between foreigners and this country, affected by the law of nations. It might be asked, was the law of nations any part of the laws of the United States? It was a question not dependent upon general argument. The judicial tribunals of the United States had repeatedly decided that the law of nations was part of the code of the United States; and this was successfully maintained and affirmed in a late case, which would be found in 14 Peters, p. 569, establishing the proposition that the law of nations is incorporated in the laws of the United States; and, therefore, the Federal courts have special jurisdiction over all such cases. This being the case, the bar set up by a foreigner prosecuted, against the jurisdiction of the State tribunals, may be pleaded successfully, on the ground of the supremacy of the judicial authority of the United States, in questions involving the law of nations incorporated in the laws of the United States.

"He referred to the 8th section of First Article of the Constitution, for the authority of Congress to pass any law necessary to carry into effect any of the powers granted by the Constitution. The question then arose, was it the constitutional duty of this Government to give a foreigner the protection due to him under the law of nations? And this Government having the power to administer the laws of the United States, of which the law of nations is a part, how could it be doubted that it has the right to afford the protection claimed under the law of nations? There were other incidental powers, such as the foreign power, and the commercial power, all depending on the law of nations. There was also the treaty-making power, and the war power; the exclusive jurisdiction in Admiralty cases—all subjected to the control of the Federal Government—showing that the jurisdiction over foreign relations, in every possible incident, devolves on this Government.

"If the Government of the United States is bound to assert and maintain those powers for the protection of her own citizens, under the law of nations, she is equally bound in justice to reciprocate the protection to the foreigner who should chance to be within the limits of the United States under similar circumstances. He supposed the case which might arise out of the detention of United States citizens in Mexico, and asked, if the release of those citizens were denied, on proof of their peaceful intentions, would not the cause of quarrel which might ensue be a violation of the law of nations? On the other hand, if those citizens are released on the demand of this Government, would it not be in consequence of the good faith of both nations in the law of nations?

"The conduct of foreign relations belongs to the Government. Congress may legislate with regard to these foreign relations, and the limits of the Congressional legislation in that respect is the only limitation that can be made to the judicial power of the United States. But the whole legislative power of Congress is subjected to the action and interpretation of the judicial department. Thus are the legislative and judicial powers commensurate with each other. This has been repeatedly affirmed by the decisions of the Supreme Court of the United States."

*Congressional Globe*, 2d Session, 27th Congress, p. 444.

The report of the debate continues:

"Mr. Choate agreed with the Senator from Georgia (Mr. Berrien) and the Senator from Pennsylvania (Mr. Buchanan) in regarding this as a very important bill. It was undoubtedly of paramount importance to exercise the constitutional jurisdiction of the national tribunals to a sufficient extent to effect one of the great objects of the Federal Government, which is to take charge of, adjust and control the foreign relations of the country. He had no doubt that he should be able to satisfy the Senate that the bill now under consideration was not only constitutional but indispensible. Before he advanced to the clause

of the Constitution under which he considered the provisions of the bill authorised, he begged leave to say that this power is consequent upon the functions of Government, deputed by the Constitution itself in other respects, and without which the judicial power would be inefficient in instances where most needed in support of the harmonious action of the Government. This view he illustrated by the analogies and undisputed power of the judicial department in relation to civil cases between the States and subjects of foreign powers.

"One great object of establishing the judicial department and making it a co-ordinate branch of the Government was, that it might promote and maintain peace between this confederation and the rest of the world. In referring to the *Federalist*, as an authority for his argument on this head, he pronounced a glowing eulogium on the writers of that book. He then quoted largely from the book itself. The tendency of the quotations was to show that the peace of the whole Union ought not to be left in a condition to be jeopardized by a fragmentary part; and hence the necessity of giving to the judicial department all control over both criminal and civil cases between the States and foreigners, whose rights may depend on the law of nations, or their allegiance to their own governments. He referred to the debates in the Convention with regard to the jurisdiction of the national tribunals, in which it was laid down as a general principle that such jurisdiction should extend to all cases involving the national peace and harmony. He contended from this, that in carrying out the principle in detail, the National Legislature was bound to keep in view the general object, as far as the letter of the Constitution did not prohibit expressly, and to embrace such cases as that of McLeod, which might jeopard the general peace.

"He would now proceed to the question, whether this power was to be found in the enumerated powers of the Constitution.

* * * * * *

"The bill under consideration involved two principles of federal power—the law-making power and the right of jurisdiction. He put the right to make such a law on two

grounds: First, on the general power of Congress to pass any and all laws necessary for the execution of enumerated powers; and next, on the ground of such a law being within the scope of the enumerated powers. These two points he argued at great length. He contended that such a law as this contemplated was not only necessary and proper, but indispensible for enabling the General Government to carry out its enumerated powers over foreign relations, commerce, trade, peace and war. The Constitution holds the General Government responsible for the peace and harmony, not only of the whole Union and its integral parts, but for the preservation of the peace with the world. It does not permit a foreign state or a power to address itself to a single State of this Union. In all cases growing out of external relations the whole Union is one and indivisible; and hence, from the very nature of its responsibilities for any breach of the law of nations, it must be inherentely clothed with the power of providing such means, and passing such laws, as may enable it to perform its national duties.

* * * * * * * * * *

"He next argued the expediency of the measure. He contended that, in every respect, it was better that the Federal Government should have jurisdiction over such cases as that of McLeod, than that any State should exercise it. He contended it would be better for the indi vidual accused; for the preservation of peace with foreign countries; for the mutual interest of nations, and for this country itself."

*Congressional Globe*, 2d Sess., 27th Cong., p. 485;

The course of the debate in the Senate, as well as the professed object of the Act of 1842, as appears from the statute itself, clearly shows that it was the intention of Congress to confer upon the Federal Courts the largest possible authority in all cases of *habeas corpus* invoked by foreigners in support of the exemptions and immunities enjoyed by them under the law of nations.

This is also fortified by the broad scope of the language employed in framing the act.

If the Courts should restrict its meaning, it would obviously be at the peril of affording every State in the Union the means of drawing the whole country into controversies and ultimate war with foreign nations.

The learned judge below, we respectfully submit, wholly misconceived the general object and purpose of the Government and Judiciary of the United States, when he held that this case should have been presented to the tribunals of the State of New Jersey.

To quote again the words of Mr. Choate (*supra*), "the Constitution holds the General Government responsible for the peace and harmony, not only of the whole Union and its integral parts, but for the preservation of the peace with the world. It does not permit a foreign state or a power to address itself to a single State of this Union. In all cases growing out of external relations the whole Union is one and indivisible."

The views of Mr. Choate have been sanctioned by this Court in a very late case, in which Mr. Chief Justice Waite, in delivering its opinion, says:

"All the rights of the States as independent nations were surrendered to the United States. The States are not nations either as between themselves or towards foreign nations; they are sovereign within their spheres, but their sovereignty stops short of nationalty. Their political status, at home and abroad, is that of States in the United States. They can neither make war nor peace without the consent of the National Government."

New Hampshire *vs.* Louisiana, 108 U. S., 76, 90.

By the Constitution of the United States the whole subject of foreign intercourse is committed to the Federal Government, and upon all questions relating thereto it alone can speak and act.

This doctrine has been carried to such an extent by the decisions of both Federal and State Courts, that it held that

a State cannot even surrender to a foreign government a person found within its borders.

Holmes *vs.* Jennison, 14 Peters, 540.

People *ex rel.* Barlow *vs.* Curtis, 50 N. Y., 321.

## Lastly.

We respectfully submit that the decision of the Circuit Court should be reversed, and the case remanded to it with instructions to grant the writ as prayed.

The privilege of a trial by the Courts of Belgium, claimed in behalf of the lad whose interests are mainly concerned in this case, is no mere unsubstantial, fanciful, or illusory fiction.

If he committed a crime, he did so before the laws of Belgium, and not before the laws of New Jersey.

He did not go upon the soil of New Jersey and slay one of her citizens.

Nor did he commit on the vessel to which he belongs any offense in its tendency or example of a nature to disturb or demoralize the public welfare of that State, because the people of that State would not even have known of the affair if the police authorities of Jersey City had not interfered.

What interest, therefore, can New Jersey have in the punishment of this boy?

On the other hand, if the alleged offender in this unfortunate affair be not surrendered, there will be an invasion of an established and wholesome rule of international law, if not a violation of a solemn treaty with a foreign power. There will be, furthermore, a denial to the prisoner of a trial under the forms of law to which he has been reared, for an offense, the nature of which he understood before he committed it only by reference to the law of his own country.

And it so happens that the trial and punishment of the offense in question, under the procedure and vindictive

sanction of the laws of Belgium, involve essential differences from those under the laws of New Jersey.

We are aware that the existence of foreign law is ordinarily a matter of proof, and we did not prove it in this particular, because it is not essential to the main question in this case.

But we may state, by way of illustrating and enforcing the observations just made, that the procedure and punishment under the laws of Belgium does vary materially —and materially in favor of this prisoner—from those provided by the laws of New Jersey.

The fact that differences in legal procedure in cases of crimes, and the measure of punishment prescribed for them, as exhibited by the laws of different nations, do exist, may be noticed by courts judicially, without proof.

These differences, as shown by the laws of Belgium, as compared with those of New Jersey, are principally these:

1. It is true that under the law of Belgium, capital punishment may be inflicted for homicide; but the King, in his mercy, never allows one of his subjects to be executed; whereas, by the laws of New Jersey, capital punishment is unfailingly inflicted in those cases of homicide coming within the degree for which it is provided.

2. The alleged offender in this case is under the age of 16 years, and by the laws of Belgium a milder and different measure of punishment would be inflicted upon him, if convicted, than upon an adult; whereas, by the law of New Jersey, there is no such distinction.

3. The means of obtaining evidence are different in the two jurisdictions. In Belgium, evidence in criminal cases may be taken by commission outside the Kingdom; whereas, in New Jersey, such means of obtaining testimoney is not allowed at all.

We state these facts by way of illustration only. If the Court wishes proof of them, it will be supplied.

A trial of the accused, under the law of New Jersey,

would work especial hardship, and probably great injustice to him.

The State authorities have seized such witnesses as would be of service to convict the prisoner. They, of course, did not detain witnesses whose testimony would be to his advantage. We do not mean to speak disparagingly of the officers of the law of that State by saying this. It was no part of their duty to detain witnesses for the prisoner. But the hardship of the case is just the same.

The crew of the ship is enlisted in Belgium. The ship comes to New York, and completes its voyage by returning to Belgium, where the crew is discharged. This wretched boy, unacquainted with the laws of New Jersey, unacquainted with the language, among strangers, and unknown, is therefore sought to be called to the bar of public justice, to plead to and defend himself against an indictment upon a criminal charge of enormous magnitude, without previous knowledge, actual or constructive, of the law he is supposed to have violated, and without the legal means of obtaining witnesses for his defense.

If this is permitted, then there will be violated the spirit if not the letter of that fundamental rule of English and American law which provides that a person accused of a capital or otherwise infamous crime shall be entitled to a speedy and impartial trial by a jury of the *vicinage*—for the *vicinage* in this case is in the Kingdom of Belgium.

We do not believe that this Court in a case involving a principle of so much importance to the national interests of the United States will abdicate its functions as the head of a great coördinate branch of the Government, by declaring that the Federal tribunals have not jurisdiction to award the writ of *habeas corpus* in this and similar cases.

F. R. COUDERT,
EDWARD K. JONES,
Counsel for Appellant.

120-1

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

THE KING OF THE BELGIANS, BY CHARLES MALI, BELGIAN CONSUL, ETC., IN BEHALF OF JOSEPH WILDENHUS AND OTHERS,

*Appellant,*

*vs.*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY.

*Appellee.*

PAPERS ON MOTION TO ISSUE SPECIAL CITATION, AND FOR LEAVE TO FILE RECORD ON APPEAL, DOCKET THE CAUSE, AND ADVANCE THE SAME FOR HEARING.

F. R. COUDERT,
EDWARD K. JONES,
*Counsel.*

COUDERT BROTHERS,
*Attorneys for Appellant.*

MIDDLEDITCH, Law Case Printer, (Law Telephone 505), 26 Cortlandt Street, N. Y.

# In the Supreme Court of the United States,

OCTOBER TERM, 1886.

---

THE KING OF THE BELGIANS, by CHARLES MALI, Consul, etc., acting in behalf of JOSEPH WILDENHUS and others,

Appellant,

AGAINST

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

Appellee.

SIR:

Take notice, that we shall move this Court, at a Stated Term thereof, to be held in the Capitol of the United States, in the City of Washington, District of Columbia, on the 15th day of November, 1886, at 12 o'clock noon, or as soon thereafter as counsel can be heard, for an order in conformity with the motion reduced to writing and annexed hereto, a copy of which, together with a copy of the affidavit of facts upon which the samed is based, are herewith served upon you.

Dated New York, November 12th, 1886.

COUDERT BROTHERS,
Attorneys for Appellant.

F. R. COUDERT,
EDWARD K. JONES,
Counsel.

To CHARLES H. WINFIELD, Esq.,
Prosecutor of the Pleas of Hudson County, New Jersey,
Jersey City, New Jersey.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

THE KING OF THE BELGIANS, by CHARLES MALI, Belgian Consul, etc., in behalf of JOSEPH WILDENHUS and others,

Appellant,

AGAINST

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

Appellee.

Upon the statements contained in the annexed affidavit of Edward K. Jones, Esq., verified the 12th day of November, 1886, the above named appellant moves this honorable Court as follows:

First. That a special citation issue to the above named appellee, returnable at some day within the present term of this Court, to be fixed by the Court.

Second. That the record on appeal be ordered to be filed in the clerk's office of this Court as of the day of the return of such special citation.

Third. That upon the filing of such record this cause be placed upon the docket; and

Fourth. That upon docketing such cause the same be advanced on the calendar and fixed for argument on the merits on such day as this honorable Court may by order direct.

Dated the 12th day of November, 1886.

F. R. COUDERT,
EDWARD K. JONES,
Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

THE KING OF THE BELGIANS, by CHARLES MALI, Belgian Consul, etc., acting in behalf of JOSEPH WILDENHUS and others,
Appellant,

AGAINST

THE KEEPER OF THE COMMON JAIL HUDSON COUNTY, NEW JERSEY,
Appellee.

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

EDWARD K. JONES, being duly sworn, deposes and says that he is an attorney and counselor of this Court, and one of counsel for the appellant in this case; that on the 6th day of October, of the present year, whilst the Belgian merchant steamship "Noordland" lay moored to her wharf in Jersey City, in the State of New Jersey, an altercation took place between two of the crew of the said vessel, namely, the above named Joseph Wildenhus and one Figens, in which Wildenhus stabbed Figens with a knife, from the effects of which he soon thereafter died; that both the said Wildenhus and said Figens were Belgian subjects and domiciled in the said Kingdom of Belgium, and that the said Wildenhus still is such a subject and so domiciled; that the said altercation occurred, and the said crime (if the same should hereafter be determined to be a crime) was wholly committed and completed below the main deck of the said steamship; that none but members of the crew of the said steamship were present at the time of the happening of the said affray; that no violation of the peace of the State or disturbance of the tranquillity of the port occurred; that, notwithstanding the facts just stated, the authorities of the

State of New Jersey have assumed jurisdiction of the said offence (if any it be) and have arrested the said Wildenhus and confined him in the jail of Hudson County, New Jersey, on the charge of felonious homicide, and at the same time the authorities of the said State of New Jersey arrested and took from the said steamship one of the quartermasters thereof and one other person, a member of the crew of the said steamship, and confined them in the same jail as witnesses to be used upon the proposed trial of the said Joseph Wildenhus; and that all the said persons are now so confined in said jail for the alleged reasons aforesaid.

And this deponent further deposes and says that, by direction of the Royal authority of Belgium, the above-named Charles Mali, as Consul for the Kingdom of Belgium for the States of New York and New Jersey, duly demanded from the authorities of New Jersey the custody of the said prisoners, upon the ground that the offence in question having been committed upon a Belgian vessel, by a Belgian subject upon another Belgian subject, both of whom were at the time subjects of Belgium, and domiciled therein, and without any disturbance of the tranquility of the port in which the same occurred, was, upon the demand of the Kingdom of Belgium, solely cognizable by the authority thereof.

First, under existing treaties, and

Secondly, by the force and operation of the general rules of the law of nations.

And this deponent further deposes and says that the demand of the Belgian Consul just above mentioned was refused by the authorities of the State of New Jersey, whereupon the said Consul, with the consent and pursuant to the desires of the said prisoners, thereafter applied to the Circuit Court of the United States for the District of New Jersey, for the writ of habeas corpus, upon the grounds and for the reasons aforesaid, to the end that the said prisoners might be released, and delivered up to the said Consul for preliminary examination, and, if probable cause should be shown, for transmission to Belgium for trial by the proper tribunal thereof.

And this deponent further shows that such proceedings were thereafter had in the said case before the said Circuit Court of the United States for the District of New Jersey that, on the

9th day of November, 1886, the said Court rendered a final decision, refusing to sustain and make absolute the said writ of habeas corpus in the said case, and thereupon dismissed the same, and remanded the said prisoners to the common jail of Hudson County, New Jersey.

And this deponent further deposes and says, that an appeal was at once duly taken in open Court from the said decision to the Supreme Court of the United States, which appeal was duly allowed by the said Circuit Court, and that a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings is now prepared and ready to be sent up to this the appellate tribunal, under such regulations and orders as this honorable Court shall prescribe.

EDWARD K. JONES.

Sworn to and subscribed before me this twelfth day of November, 1886.

HARTLEY G. PELLETIER,
[L. S.] Notary Public,
Kings and New York Counties,
State of New York.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:
City and County of New York,

R. OGLE MULLIKIN, being duly sworn, deposes and says that he is of the age of eighteen years and upwards; that on the 12th day of November, 1886, at the County Court House, in the city of Jersey City, Hudson County, New Jersey, he served copies of the foregoing notice, motion and affidavit on Charles H. Winfield, Prosecutor of the Pleas for the said County of Hudson, by delivering the said papers to a clerk in charge of the office of said Charles H. Winfield and leaving the same with the said clerk.

R. OGLE MULLIKIN.

Sworn to before me, this 13th day of November, 1886.

HARTLEY G. PELLETIER,
Notary Public,
[SEAL.] Kings and New York Counties,
State of New York.

120-1

# SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886. No. 1288.

THE KING OF THE BELGIANS, BY CHARLES MALI, CONSUL, ETC., ACTING FOR AND IN BEHALF OF JOSEPH WILDENHUS, AND OTHERS,

*Appellants,*

*against*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

*Appellee.*

## I. EXTRACT FROM TREATY BETWEEN THE UNITED STATES AND BELGIUM, OF MARCH 9, 1880.

## II. EXTRACT FROM U. S. CONSULAR REGULATIONS OF 1881.

F. R. COUDERT,
EDWARD K. JONES,
*Counsel for Appellants.*

COUDERT BROTHERS,
*Attorneys,*
68 William Street, N. Y.

LIVINGSTON MIDDLEDITCH, Law Case Printer, 26 Cortlandt Street, N. Y.

# Supreme Court of the United States,

OCTOBER TERM, 1886.

No. 1288.

---

THE KING OF THE BELGIANS, by CHARLES MALI, Consul, etc., acting in the behalf of JOSEPH WILDENHUS, and others,

Appellant,

AGAINST

THE KEEPER OF THE COMMON JAIL of HUDSON COUNTY, New Jersey,

Appellee.

To the Honorable Justices of the Supreme Court of the United States:

Since the argument of this case, our attention has been called to the provisions of Article XI of the Treaty between the United States and Belgium, of March 9th, 1880, as follows:

ARTICLE XI.

"The respective consuls-general, consuls, vice-consuls and consular agents shall have exclusive charge of the internal order of the merchant vessels of their

nation, and shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly with reference to the adjustment of wages and the execution of contracts.

"*The local authorities shall not interfere except when the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore, or in the port, or when a person of the country or not belonging to the crew, shall be concerned therein.*

"In all other cases, the aforesaid authorities shall confine themselves to lending aid to the consuls and vice-consuls or consular agents, if they are requested by them to do so, in causing the arrest and imprisonment of any person whose name is inscribed on the crew list, whenever, for any cause, the said officers shall think proper."

(21 U. S. Stats. L., p. 781.)

We respectfully submit this, the latest understanding between the two nations, believing, as we do, that the Court will accept all the light accessible upon the question under consideration. As the discussion of the case on the part of counsel is closed, we refrain from any comment.

We also add a printed extract from the U. S. Consular Regulations of 1881, cited by us at the argument, but not printed in our brief. The paragraphs cited are as follows:

[*Extracts from U. S. Consular Regulations* 1881.]

ARTICLE XVIII.

"*Disputes between Masters, Officers and Crews.*

"302.—The general principle of the treaties and conventions of the United States with foreign powers, in reference to vessels and seamen, is that

the Consular officers shall take jurisdiction over questions of wages, shipment, and discharge of seamen, *and over all transactions occurring on board vessels of the United States lying in a foreign port, whether in the nature of contracts, torts or crimes, so far as they concern only the vessels and their cargoes and the persons belonging on board.* If they concern the public peace of the country, or the rights of persons not belonging on board, they are subjects of local jurisdiction. A list of the treaties and conventions will be found in Appendix 1, and the countries with which stipulations have been provided for disputes between masters and crews are mentioned in paragraph 93.

"303.—In some treaties the jurisdiction of the Consular officer is restricted to differences in regard to wages; in others it is extended to all disputes, whether arising out of tort or contract. And in some cases the Consular officer is authorized to call on the local authorities to give forcible assistance to preserve and enforce his decisions, and to imprison the crew of the vessel. Whenever a case arises, reference must be made to the provisions of the particular treaty or convention with the country in which the Consular officer is acting for the extent of his jurisdiction in these respects.

"304.—By treaties with several non-Christian States and semi-civilized countries, exclusive jurisdiction has been provided for, not only as regards vessels and mariners and disputes between American citizens, but also as to offenses and crimes. In Borneo, China, Japan, Madagascar and Siam, the jurisdiction embraces criminal offenses committed by citizens of the United States; and in Morocco, Tripoli and Tunis, Consuls are empowered to assist in the trials of American citizens accused of murder or assault. In countries, however, in which

Consular Courts are provided for the proceedings will be in accordance with the rules and regulations prescribed in conformity with law.

"305. In the absence of a treaty or convention with the country within which the Consular officer resides, he has no jurisdiction of differences and disputes between master and crews or between American citizens *except in so far as it may be permitted by the foreign State through the exercise of comity, or reciprocity, or by long established usage.** As respects such disputes and differences, the adjustment is to be made, whether under treaty or otherwise, in accordance with the laws of the United States, and not with those of the foreign power. "*The rule is, that all matters growing out of contract with the crew, or affecting the police of the ship, are subject to the laws of the State to which the vessel belongs. Although such matters may in some countries be submitted to the local tribunals, the proceeding should be discouraged as undesirable in many respects. In countries with which the United States have no treaty or convention, but in which a permissory jurisdiction has been granted or acquired, a Consular Officer should be careful to avail himself of it.*"

A copy of this communication has been sent to Mr. Winfield, the Prosecutor of the Pleas of Hudson County, N. J., the counsel who argued the opposite side of the cause at the hearing before the Court.

Very respectfully,

F. R. COUDERT,
EDWARD K. JONES,
*Counsel for Belgium.*

* The case of the "Newton," decided by the French Council of State in 1806, arose in the port of Antwerp.

120-1

# U. S. Supreme Court.

No. 1288.

CHARLES MALI, CONSUL OF HIS MAJESTY THE KING OF THE BELGIANS, AND JOSEPH WILDENHUS,

*Appellants,*

*vs.*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

*Appellee.*

*Brief for Appellee.*

On Appeal from decision of the Circuit Court of the United States for the District of New Jersey.

**C. H. WINFIELD,**

*Of Counsel with Appellee.*

# U. S. Supreme Court.

No. 1288.

CHARLES MALI, CONSUL OF HIS MAJESTY THE KING OF THE BELGIANS, AND JOSEPH WILDENHUS,

*Appellants,*

*vs.*

THE KEEPER OF THE COMMON JAIL OF HUDSON COUNTY, NEW JERSEY,

*Appellee.*

*Brief for Appellee.*

On Appeal from decision of the Circuit Court of the United States for the District of New Jersey.

## STATEMENT OF THE CASE.

On October 6, 1886, the Steamship Noordland, a Belgian merchant vessel, was lying in her slip and fastened to the wharf in Jersey City, Hudson County, New Jersey. Joseph Wildenhus, one of the appellants, and Henry Fijens, both subjects of the Kingdom of Belgium, were members of the crew. While on board of said steamship a difficulty or misunderstanding arose between them. Wildenhus, with a knife, inflicted a wound on Fijens, of which in a short time, he died, Wildenhus was then arrested and held to answer the charge of murder in New Jersey. On October 12, 1886, the appellants sued out of the Circuit Court of the United States for the District of New Jersey a writ of *habeas corpus* on petition for the release of said Wildenhus, and his surrender to the petitioner to be dealt with according to the law of Belgium. On due hearing this writ was dismissed and Wildenhus remanded to the custody of the appellee. From that decision this appeal was taken to this Court.

## POINTS AND ARGUMENT.

The prisoner Wildenhus is held to answer the charge of murder.

The other two persons, Gobnbosich and Osteameyer, witnessed the homicide, and are held to testify under section fourteen of "An act regulating proceedings in criminal cases." Rev. Stat. 269.

"It shall be the duty of all and every such judge, justice and justices of the peace to bind by recognizance with surety, if need be, all such persons as can give testimony against any such offender, touching his or her offence, to appear at the next Court of General Quarter Sessions of the Peace or of Oyer and Terminer and gener-

al jail delivery, as the case may require, to be held within the county where the trial thereof shall be had, then and there to give evidence against such offender."

By an agreement between the commissioners of New York and New Jersey, entered into Sept. 16, 1833, ratified by the State of New Jersey Feb. 26, 1834, confirmed by the State of New York Feb. 5, 1834, and *approved by the Congress of the United States June 28, 1834*, the boundary between the two States and the criminal jurisdiction of the State of New Jersey were established. N. J. Rev. Stat. 1178. The articles necessary to be referred to in that agreement are as follows :

"Article I. The boundary line between the two States of New York and New Jersey, from a point in the middle of Hudson river, opposite the point on the west shore thereof, in the forty-first degree of north latitude, as heretofore ascertained and marked, to the main sea, shall be the middle of said river, of the bay of New York, of the water between Staten Island and New Jersey, and of Raritan bay, to the main sea, except as hereinafter otherwise particularly mentioned.

Article III. The State of New York shall have and enjoy exclusive jurisdiction of and over all the the waters of the bay of New York, and of and over all the waters of Hudson river, lying west of Manhattan Island, and to the north of the mouth of Spuyten Duyvel creek, and of and over the lands covered by the said waters, to the low-water mark on the westerly or New Jersey side thereof, subject to the following rights of * * * jurisdiction of the State of New Jersey, that is to say,

2. The State of New Jersey shall have the *exclusive jurisdiction of and over the wharves, docks and improvements made on the shore of said State, and of and over all vessels aground on said shore, or fastened to any such wharf or dock*, except that the said vessels shall be subject to the quarantine or health laws, and laws in relation to passengers of the State of New York, which now exist or which may hereafter be passed.

Article VI. Criminal process issued under the authority of the State of New Jersey against any person accused of an offence committed within that State, or on board of any vessel being under the exclusive jurisdiction of that State aforesaid * * * * may be served upon any of the said waters within the exclusive jurisdiction of the State of New York, unless such person * * shall be on board a vessel aground upon or fastened to the shore of the State of New York, or fastened to a wharf adjoining thereto." * *

There is no question as to the fact that the homicide was committed within the territorial limits of the State of New Jersey.

In the eighth paragraph of his petition, *Transcript of Record, p. 2, fol. 5*, the petitioner insists "that the said affray occurred outside of the jurisdiction of the said State of New Jersey." If this is true there must be some restriction on the sovereignty of New Jersey over crimes committed within her borders, and the investment thereof, to the extent of the restriction, in the King of the Belgians.

In *United States vs. Bevan, 3 Wheat. 336*, Marshall, Ch. J., asked this question, "What, then, is the extent of jurisdiction which a State possesses?" He answered the question as follows, "We answer, without hesitation, the jurisdiction of a State is co-extensive with its territory, co-extensive with its legislative power."

"The sovereignty united to the domain, establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province or that of her sovereign to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country. Other nations ought to respect this right.

*Vattel, B. 2, c. 8, § 84.*

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sov-

ereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose the restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of that nation itself. They can flow from no other legitimate source."

*Schooner Exchange vs. McFaddon, 7 Cranch. 36.*

There is no pretence that Wildenhus is in custody in violation of the Constitution of the United States. If he is entitled to relief under the writ, it must be because he is in custody in violation of international law or of the treaty with Belgium.

Unless, therefore, some positive law or treaty of the United States has restricted the jurisdiction of New Jersey the homicide in question is within her jurisdiction and Wildenhus is liable in her Courts. This leaves but two questions to answer, and the proper answer to those questions will, I apprehend, bring us squarely within the restrictions of Section 753 of the Revised Statutes, to which I will call attention at the close of my brief.

I. Is Wildenhus in custody in violation of any law of the United States?

Wheaton defines international law "as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society, existing among independent nations, with such definitions and modifications as may be established by general consent."

*Wheaton Int. Law, (6th Edit.) 22.*

This definition was approved in *Hein vs. Bridault, 37 Miss. 230.*

The peculiar law of France, so much relied upon by the appellants, does not come within this definition. Her tribunals decline to take jurisdiction of acts of mere interior discipline of a foreign merchant vessel, *or even crimes and offences*, committed by a person forming part of its officers and crew, against another person belonging to the same where the peace of the port is not thereby disturbed. In the language of Mr. Wheaton, *(Int. Law, 6th Edit. 154)*, "the legislation of France waives, in favor of such vessels, the exercise of the local jurisdiction to a greater extent than appears to be imperatively required by the general principles of international law. As it depends on the option of a nation to annex any conditions it thinks fit to the admission of foreign vessels into its ports, so it may extend, to any degree it may think fit, the immunities to which such vessels, entering under an implied license, are entitled by the general law and usages of nations."

The two cases then, which are found in the French Courts, and cited by Mr. Wheaton, and in the appellants' brief, have no force in international law, and can have no bearing on this case.

Is not every person coming within the jurisdiction of a State subject to its laws? Does he not owe a local allegiance in return for the protection afforded by the government? Could the crew of every foreign merchant vessel now lying in the Port of New York, slaughter each other with impunity and defy the local authority on the ground that by international law they must be sent home for trial? I know not where to find such a law.

Local allegiance and protection go hand in hand. It is doubtful if the appellants would repudiate their right to protection from the local authorities from assaults of lawless members of the ship's company, while their vessel is lying at our wharf.

*Vattel, B. 2, § 101*, says that "even in countries which every foreigner may freely enter, the Sovereign is supposed to allow him access only upon this tacit condition, that he shall be subject to the laws. I mean the general laws made to maintain good order."

But this Court has declared its views on this subject. In *Schooner Exchange vs. M'Faddon, 7 Cranch. 115* (144) Ch. J. Marshall said, "When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries, are not employed by him, nor are they in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption."

Drawing a distinction between a war vessel and a merchant vessel Mr. Bishop says: "A foreign merchant ship coming within our harbors is, however, subject to our local jurisdiction, the same as any foreign private person, except as we have agreed otherwise by treaty."

*1 Bish. Cr. L. (2d Edit.) § 590.*

In *The People vs. Tyler, 7 Mich. 161 (209)*, the Court said, "Upon the high seas, every vessel, public or private, is, for jurisdictional purposes, a part of the territory of the nation of its owners. An offense committed on board of such vessel is an offense against the sovereignty of that nation. But when a private ship enters a foreign jurisdiction, it becomes at once, with all on board, in the absence of treaty stipulations to the contrary, subject to the municipal laws and control of the country it visits. Any crime committed there may be punished there by the local laws. The right

to enter upon and navigate the waters of any country, is subject in all cases to the condition of temporary obedience to its laws."

Again, (p. 227) "Whenever a vessel reaches a place clearly within the territorial dominions and rightful and complete jurisdiction of another sovereignty, the jurisdiction of the nation to which the vessel belongs terminates, and that of the foreign sovereignty begins. It is true the jurisdiction of the nation to which she belongs continues to a qualified extent over the ship and its company, and for some purposes over its citizens, * * but such jurisdiction can only be there exercised by the permission of the foreign sovereignty."

Wheaton *(Int. Law, 6th Edit. 144)* says: "The private vessels of one State, entering the ports of another, are not exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact."

I respectfully submit that Wildenhus is not in custody in violation of any law, and this Court is not bound by the law of nations to take him from the custody he is in and surrender him to the Belgian Consul.

The law of nations rather requires his detention, that he may answer for the act in the jurisdiction where committed. The legislation of the Congress of the United States is not in conflict with this position. The Crimes act of March 3, 1885—4 Stat. at Large pp. 115–116—provides for punishment of citizens and members of the ship's company for crimes committed on board of American vessels while lying in foreign ports, but on this condition, "provided always that if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent Court of such foreign State, *he shall not be subject to another trial in any Court of the United States.*"

Is it not too clear for argument that this proviso admits the right of the foreign State to try the offender? The statute only provides that the offender shall be tried either in the jurisdiction

where the offence was committed or in the country where he belongs.

II. Is Wildenhus in custody in violation of any treaty of the United States?

Article XI. of the "Consular Convention between the United States of America and his Majesty the King of the Belgians, concluded at Brussels Dec. 5, 1868," is the article under which the petitioner, Wildenhus, demands his release from his present custody. This article reads as follows: "Consul Generals, vice-Consuls and Consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captains, officers and crews, without exception, particularly in reference to the adjustment of wages and the execution of contracts. Neither the Federal, State or Municipal authorities or Courts in the United States, nor any Court or authority in Belgium shall on any pretext interfere in these differences."

It is only "differences" between the officers and crews in which the Courts of New Jersey cannot interfere; of which the Consul alone takes cognizance. I submit:

1. These "differences" relate only,

   a. To the internal order of the vessel.
   b. To the adjustment of wages.
   c. To the execution of contracts

And cannot be extended beyond these three subjects.

Why limit the Consul's jurisdiction to "differences," if he can exercise jurisdiction without interference in cases like this? It would be without limit. The word in the treaty puts the case too mildly.

2. It is a loose if not vicious construction of language to hold that the word "differences" in the article includes crimes against the State.

In the "treaty of commerce and navigation between the United States of America and his Majesty the King of Prussia, concluded at Wa hington, May 1, 1828," the Consuls have the right "to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities."

Here the subject matter of their jurisdiction lies in this same word, "differences."

In an act of Congress approved Aug. 8, 1846, *9 U. S. Statutes at Large 78*, power is given to the District and Circuit Courts of the United States and to the Commissioners to take bail, to enforce the award, arbitration or decree of the Consuls on such "differences." This shows that Congress understood the word as relating only to the internal order of the vessel, the adjustment of wages and execution of contracts, and not to crimes against the sovereignty in whose jurisdiction the vessel might be. What award could a Consul make in a homicide case? And how would a Court enforce the award? The same statute has been substantially re-enacted in §§ *4079–4081 Rev. Stat.*, and made applicable in all instances.

But it is seriously argued that because "the peace of the port" was not disturbed, the State can have no jurisdiction. In the Prussian treaty the words are, "the order or tranquility of the country." But I submit that each phrase is to be referred back to the "differences" among the crew, &c. If in maintaining those "differences," public tranquility or the peace of the port is disturbed, the jurisdiction of the Consul is taken away, even in the matter of those differences.

Nearly all of the authorities referred to in the Appellant's brief, and especially the French writers, draw a distinction between crimes and offences which disturb the peace of the port and those which disturb only the order of the ship. The counsel's argument is largely based on this distinction. Massé says that crimes which

The public order is the order of God among men established for the regulation of the general society. The public tranquility is the repose of the community coming from obedience to the law of public order.

1 *Bish. Cr. L.* (2*d Edit.*) 394.

All acts, such as riot, rout, unlawful assembly, affray, forcible detainer, forcible entry, sending a challenge, going about armed to the terror of the people, spreading false news, publishing libels, eavesdropping, barratry, maintenance and champerty, which disturb the peace of the community, are indictable. If one of the crew thus disturbs the public peace, it is admitted that the Consul cannot interfere. Even the Consular Regulations of Belgium limit his sphere of interference by "the peace of the port." That is to say, a mere breach of the peace would estop the Consul from interfering with the local authorities, but in case of homicide he has the right, and under his consular regulations it is his duty, to interfere unless the crime is accompanied by an actual disturbance. If perpetrated quietly, if the slayer come secretly to his work, if the victim meet his death with calmness, then the jurisdiction of Belgium is exclusive; but if any noise, accompanying the homicide, can be heard outside of the vessel, to the disturbance or terror of those who hear it, then the jurisdiction of New Jersey is absolute. And is this law? Ay, marry, is it—the law of his Majesty the King of the Belgians!

2. It is a loose if not vicious construction of language to hold that the word "differences" in the article includes crimes against

the jurisdiction of the Consul is taken away, even in the matter of those differences.

Nearly all of the authorities referred to in the Appellant's brief, and especially the French writers, draw a distinction between crimes and offences which disturb the peace of the port and those which disturb only the order of the ship. The counsel's argument is largely based on this distinction. Massé says that crimes which "disturb the order of the place" belong to the territorial jurisdiction. Halleck says, If the master or crew, while on board in such port, *break the peace of the community* by the commission of crimes, no exemption can be claimed for them.

Halleck Int. Law, 172–3.

The same language is used by Mr. Webster.

Diplomatic and Official Papers, p. 83.

I confess that I do not know, and the Appellant's brief has not informed me, what "the peace of the port" ~~or "order of the place~~" is, which may be disturbed by a crime. As a port has no power to punish a breach of its peace, to me it is incomprehensible how "the peace of the port" can be disturbed, if the phrase is to be taken litterally. Does it not mean what we call "the peace of the State"? or what Halleck calls "the peace of the community"?

As the greater includes the less, does not the peace of the State include the peace of the port? And when a crime is committed *against the peace of the State*—as all crimes are thus committed—is not the *peace of the port* necessarily disturbed thereby?

Rider

Every person, when not in the violation of the law, at least, is in the peace of the State. When violence is committed upon his person, without excuse or justification, howsoever secretly, though no eye saw, nor ear heard it, is not the "peace of the State" disturbed? Is not the act against the "peace of the State?" Such an act does concern others than (as in this case) the crew of the vessel. It concerns the sovereignty whose laws have been violated.

But in this case the Consul does not pretend to have power under the treaty to adjust a "difference" between Wildenhus and his victim. The deceased is beyond the reach of his adjudication. All the Consul here claims is the surrender of the prisoner for the purpose of sending him to Belgium for trial for a crime committed in New Jersey. There is nothing in the treaty justifying such a claim.

The only authority (if authority it may be called) for this unusual interference by the Belgian Consul seems to be found in certain "Consular Rules" established by the King of the Belgians, and found on page 10 of the printed case. These rules are not justified by the treaty, nor are they sanctioned by international law. The government of the United States has not assented to them. The Consul has no standing in this Court, nor right to ask its assistance in his efforts to enforce them. No one but the Consul of Belgium is bound to respect them.

Thus the two questions in the case have been answered and I respectively submit, that the petitioner Wildenhus is not in custody in violation of any law or treaty of the United States, therefore the Court below was bound by the statute to dismiss the writ and remand the prisoner.

The case clearly comes within the restrictions of the statute. *Vide Revised Statutes*, § 753. This section provides that the writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody, (among other causes not applicable to this case,) in violation of the constitution, or of a law or treaty of the United States.

The contention in the appellants' brief is, that the prisoner is entitled to his discharge;

1. Because, in the language of the statute, *being a subject of a foreign State and domiciled therein, he is in custody for an act done or committed under an alleged right;*

2. Because he is in custody for an act done under *privilege, protection, or exemption claimed under the commission or order, or sanction of a foreign* State, or under color thereof, the validity *whereof depend on the law of nations.*

It would be difficult to find his *alleged right* to commit murder. No *commission or order, or sanction of a foreign State* to commit murder has been cited.

If the contention has not much law or morality in it, it certainly possesses the merit of novelty.

C. H. WINFIELD,

*Of Counsel with Appellee.*